IN THE SUPREME COURT OF FLORIDA

BARON GREENWADE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC12-598

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Baron Greenwade, the Appellant in the district court and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four (4) volumes, which will be referenced as "R." and by appropriate volume, followed by any appropriate page number. The record also contains one supplemental volume which will not be referenced. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

An information was filed, charging Appellant with Count I: trafficking in cocaine; Count II: possession of a firearm by a convicted felon; Count III: possession of controlled substance paraphernalia; Count IV: resisting an officer without violence. (R.I. 10).

On April 29, 2009, Detective Donald Bishop along with Detective C.W. Brown and Detective Robert Moodispaw, entered Petitioner's home through a garage door during the execution of a search warrant. (R.IV. 237, 241, 264-65, 274-75). Detective Bishop saw Petitioner sitting behind a table in the garage. (R.IV. 242-43); *Greenwade*, 80 So. 3d at 372. Upon entry into the garage, Petitioner fled into the house through a side garage door. (R.IV. 244, 267). Detective Bishop made contact with Petitioner after his unit entered the house and detained Petitioner at the top of the stairwell. (R.IV. 244). While Detective Bishop walked Petitioner down the stairwell, Petitioner stated, "I know why you're here . . . what you are looking for is in the garage." (R.IV. 245); *Greenwade*, 80 So. 3d at 372. Petitioner also told Detective Bishop that "there was cocaine in a green bag in the garage where he was sitting." (R.IV. 245); *Greenwade*, 80 So. 3d at 372.

A digital scale was on the table and a green bag was next to the table. (R.IV. 248-49); *Greenwade*, 80 So. 3d at 372. A "spoon with cocaine residue on it" was

located on top of the green bag. *Greenwade*, 80 So. 3d at 372; *see* (R.IV. 246). The green bag contained "nine powder-filled one-ounce plastic baggies." *Id.*; *see* (R.IV. 246). Detective Bishop read Petitioner his *Miranda* rights. (R.IV. 250); *Greenwade*, 80 So. 3d at 372. Petitioner indicated he understood his rights and told Detective Bishop that it was his cocaine. (R.IV. 251); *Greenwade*, 80 So. 3d at 372.

Prior to being sent to the property room of the Sherriff's Office, every individual baggy was field tested. (R.IV. 260-61); *Greenwade*, 80 So. 3d at 372. The baggies that tested positive for cocaine were combined. (R.IV. 260-61). "Once [at the Sherriff's Office], they were emptied and each baggie put in its own envelope. According to Detective Bishop, it is standard procedure to combine the contents of individual packets for subsequent lab testing." *Greenwade*, 80 So. 3d at 372.

Florida Department of Law Enforcement ("FDLE") forensic scientist Dr. Katherine Warniment received the "off-white powder" to test for controlled substances. (R.IV. 285, 287-88); *Greenwade*, 80 So. 3d at 372. Dr. Warniment testified that when she performed the tests on the sample, she conducted two different tests and took "sampling[s] from several different areas of the powder" and found "nothing unusual in those observations . . . ." (R.IV. 291). Dr. Warniment concluded that the sample tested positive for cocaine. (R.IV. 292);

Greenwade, 80 So. 3d at 372. "Dr. Warniment did not - and does not - test for purity because the law does not require the lab to quantify the amount of cocaine in a given sample." *Greenwade*, 80 So. 3d at 372. The sample weighed 234.5 grams. (R.IV. 293); *Greenwade*, 80 So. 3d at 372.

At trial, Detective Bishop testified that he was member of the violent crimes task force which also conducts drugs investigations. (R.IV. 237). Detective Bishop received advanced narcotic investigation and had purchased powder cocaine before. (R.IV. 238). He also testified that in order to obtain a search warrant for a controlled substance, "what we'll do is make a controlled buy from a residence of a controlled substance like cocaine, marijuana and such." (R.IV. 239).

The jury found Petitioner guilty of trafficking in cocaine as charged in the information. (R.IV. 351); *Greenwade*, 80 So. 3d at 371. Petitioner was sentenced to 15 years in Florida State Prison with a minimum mandatory of 7 years and a $100,000 fine. (R.II. 15). Petitioner pled guilty on the remaining counts and was adjudicated guilty. (R.I. 194-95; R.II. 16); *Greenwade v. State*, 80 So. 3d 371, 371 (Fla. 1st DCA 2012). For Count II, Petitioner was sentenced to 15 years, along with 159 days in prison with 159 days credit for time served on Counts III and IV. (R.II. 16); *Greenwade v. State*, 80 So. 3d 371, 371 (Fla. 1st DCA 2012). Petitioner appealed to the First District Court of Appeal. (R.II. 212-13).

The First District addressed the issue of "whether the trial court should have

granted his motion for judgment of acquittal on the cocaine trafficking charge because the state combined, tested and weighed the contexts of nine small bags found in his possession instead of testing each bag for cocaine before commingling and weighing their contents." *Greenwade*, 80 So. 3d at 371. The First District pointed to the language of the statute itself, emphasizing that Section 893.135(1)(b)1. requires a certain amount of cocaine "or of any mixture containing cocaine" to achieve the weight for a trafficking amount. *Id.* at 372. The court considered the cases of *Ross*, *Safford*, and *Sheridan*, but declined to follow them "because, in our view, their apparent bright line rule creates an untenable distinction between cases involving multiple packages of suspicious white powder and cases involving just one package." *Id.* at 373.

The First District continued that this Court's opinion in *State v. Yu*, 400 So. 2d 762 (Fla. 1981) and

> the Legislature's policy reason for penalizing possession of mixtures or compounds containing cocaine: pure cocaine can be (and assuredly is) diluted with other substances to facilitate broader distribution. This policy, we believe, legitimizes the practice of commingling multiple packets for chemical testing and weighing, where the circumstances attending the discovery and seizure of the packets permit the reasonable conclusion that they contained contraband, and perhaps other substances, to be used in illegal drug distribution.

Id. at 374. The court furthered that commingling of the nine baggies containing Petitioner's cocaine was proper to determine the weight amount for trafficking:

> Appellant, whom officers apprehended after executing a residential search warrant, told Detective Bishop, "What you are looking for is in the garage." There, stored together inside a green bag were the nine individual bags of white powder. Appellant admitted the bag contained cocaine. On top of the bag was a spoon with cocaine residue on it, and on the table beside the bag was a digital scale - tools of the drug trade. All the seized baggies were field tested before its contents were combined and sent to the FDLE lab. This evidence, together with the positive chemical test performed on the commingled powder, was sufficient for the jury to find Appellant had more than 200 grams of cocaine or a mixture of cocaine in his possession.

Id. The First District certified conflict with *Ross*, *Safford*, and *Sheridan* "to the extent those cases hold that the lab's failure to test each package before commingling to determine weight renders insufficient the State's evidence of trafficking, notwithstanding other circumstantial evidence of the offense." *Id.* This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Petitioner challenges the First District's ruling on the basis that the nine baggies of cocaine that Petitioner admitted belonged to him and contained cocaine were improperly combined prior to being tested by a FDLE chemist for the purity of the substance. However, the State presented competent, substantial evidence of the crime of trafficking in cocaine of more than 200 grams but less than 400 grams, properly allowing Petitioner's case to be submitted to the jury. On these facts, it was entirely reasonable for a jury to conclude that the nine baggies contained cocaine or a mixture containing cocaine.

Petitioner asserts that this Court should adopt the unyielding bright line rule enunciated by the Second and Third Districts in *Ross v. State*, 528 So. 2d 1237 (Fla. 3d DCA 1988), *Safford v. State*, 708 So. 2d 676 (Fla. 2d DCA 1998) and *Sheridan v. State*, 850 So. 2d 638 (Fla. 2d DCA 2003) that combining packets of cocaine or a mixture of cocaine prior to each packet of cocaine being laboratory chemically tested which in the aggregate satisfies the statutory weight is insufficient to prove that a defendant committed the crime of trafficking in cocaine under any circumstance. However, the *per se* rule of *Ross*, followed by *Safford* and *Sheridan*, that mandates individual chemical testing prior to combining multiple packages of suspected cocaine to be weighed together is wrong. Under this line of case law, the State can never meet its burden of establishing by

competent and substantial evidence that an individual trafficked in cocaine unless the rigid rule of *Ross* is adhered to without diversion. The proper rule for sufficiency of the evidence is whether a rationale jury could conclude a substance to be an illegal controlled substance when considering the totality of the circumstances, including the substance's appearance and packaging, the proximity of the packaged substances to one another, the presence of drug paraphernalia, the circumstances that led to the seizure of the substance, an individual's on-the-scene remarks identifying the substance, and the positive results of any field tests prior to the combining of multiple baggies. The First District correctly found that the surrounding circumstances can be taken into account by the jury to decide if the State established beyond a reasonable doubt that a defendant committed the crime of trafficking in cocaine.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE LAW ENFORCEMENT COMBINED MULTIPLE BAGGIES OF COCAINE FOR LABORATORY CHEMICAL TESTING WHERE THE CIRCUMSTANCES SURROUNDING THE DISCOVERY AND SEIZURE OF THE COCAINE LED TO THE REASONABLE CONCLUSION THAT THE BAGGIES CONTAINED COCAINE. (RESTATED)

A. Standard of review.

Viewing evidence in the light most favorable to the State, an appellate court reviews a motion for judgment of acquittal *de novo*. *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002); *see Durosseau v. State*, 55 So. 3d 543, 557 (Fla. 2010); *Baugh v. State*, 961 So. 2d 198, 204 (Fla. 2007). Due to the posture of this case, it is imperative to reiterate that "[i]n moving for a judgment of acquittal, a defendant 'admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence.'" *Beasley v. State*, 774 So. 2d 649, 657 (Fla. 2000). A trial court "should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974). Where the State has produced competent, substantial evidence to support every element of a crime, a judgment of acquittal is not proper. *Donaldson v. State*, 722 So. 2d 177, 182 (Fla. 1998). Further, a motion for judgment of

acquittal must be denied if a "rational trier of fact could find the **existence of the elements of the crime** beyond a reasonable doubt." *Troy v. State*, 948 So. 2d 635, 646 (Fla. 2006) (emphasis added).

B. The State presented competent and substantial evidence demonstrating that Petitioner committed the crime of trafficking in cocaine of more than 200 grams but less than 400 grams the appearance of the cocaine was described as an off-white powder that was packaged in nine baggies that were placed in a large green bag, a spoon with cocaine residue was on top of the baggies, a scale was next to the large green bag, the cocaine was seized pursuant to a search warrant, Detective Bishop individually field tested the nine baggies and combined all of the baggies that tested positive for cocaine, and Petitioner admitted that the substance was cocaine and that it belonged to him.

The First District confronted the issue of "whether the trial court should have granted [Petitioner's] motion for judgment of acquittal on the cocaine trafficking charge because the state combined, tested and weighed the contexts of nine small bags found in his possession instead of testing each bag for cocaine before commingling and weighing their contents." *Greenwade*, 80 So. 3d at 371. The First District concluded that multiple packets of cocaine can be combined prior to chemical testing "where the circumstances attending the discovery and seizure of the packets permit the reasonable conclusion that they contained contraband, and perhaps other substances, to be used in illegal drug distribution." *Id.* at 374. Applying this rule, the district court found that the State met its burden of presenting competent and substantial evidence that Petitioner committed the crime of trafficking in cocaine and certified conflict with *Ross*, *Safford*, and

Sheridan on the premise that this line of cases require chemically testing prior to combing substance to determine if the statutory weight amount was established by sufficient evidence. *Id.*

Specifically, the First District relied on the language of the statute defining the crime of trafficking in cocaine which occurs when "any 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 . . . **or of any mixture containing cocaine**, but less than 150 kilograms of cocaine **or any such mixture**." § 893.135(1)(b)1., Fla. Stat. (2009) (emphasis added); *see* Fla. Std. Jury Instr. (Crim.) 25.10. A mixture of cocaine is defined as "any **mixture** containing cocaine **without regard to the quantity or percentage of cocaine in the mixture**." *State v. Yu,* 400 So. 2d 762, 764 (Fla. 1981) (emphasis added); *see Velunza v. State,* 504 So. 2d 780, 781 (Fla. 3d DCA 1987) (indicating that this Court in *Yu* "concluded that the legislature intended to classify offenders of section 893.135(1)(b) according to the amount of the substance containing the cocaine and *not* by the amount of pure cocaine. The record indicates that the contraband, which weighed 1006 grams, contained *some* cocaine; therefore, under *Yu*, the state established that Velunza possessed 400 grams or more of a mixture containing cocaine") (emphasis in original). The purpose for this definition is that "the legislature reasonably . . . concluded that a mixture containing cocaine could be

distributed to a greater number of people than the same amount of undiluted cocaine" potentially causing greater and more widespread harm to the public. *Id.* at 765. When determining the character of a substance, "[t]he state may prove the identity of a controlled substance by circumstantial evidence such as the substance's appearance, odor, and packaging, by the circumstances under which the substance was seized, the manner by which the substance was being transported, a person's on-the-scene remarks identifying the substance, and circumstances surrounding the sale or use of the substance." *Pama v. State*, 552 So. 2d 309, 311 (Fla. 2d DCA 1989).

Petitioner challenges the First District's ruling on the basis that the nine baggies of cocaine that Petitioner admitted belonged to him and contained cocaine were improperly combined prior to being tested by a FDLE chemist for the purity of the substance. (IB. 16). However, the State presented competent, substantial evidence of the crime of trafficking in cocaine of more than 200 grams but less than 400 grams, properly allowing Petitioner's case to be submitted to the jury. On these facts, it was entirely reasonable for a jury to conclude that the nine baggies contained cocaine or a mixture containing cocaine. *See Beasley*, 774 So. 2d at 657 (quoting *Lynch*, 293 So. 2d at 45); *Lyons v. State*, 807 So. 2d 709 (Fla. 5th DCA 2002). The First District correctly found that the surrounding circumstances can be taken into account by the jury to decide if the State established beyond a

reasonable doubt that a defendant committed the crime of trafficking in cocaine. *Greenwade*, 80 So. 3d at 374.

Petitioner asserts that this Court should adopt the bright line rule enunciated by the Second and Third Districts in *Ross v. State*, 528 So. 2d 1237 (Fla. 3d DCA 1988), *Safford v. State*, 708 So. 2d 676 (Fla. 2d DCA 1998) and *Sheridan v. State*, 850 So. 2d 638 (Fla. 2d DCA 2003) that combining packets of cocaine or a mixture of cocaine prior to each packet of cocaine being laboratory chemically tested "which in the aggregate satisfies the [ ] statutory weight" is insufficient to prove that a defendant committed the crime of trafficking in cocaine under any circumstance. The decisions in *Ross*, *Safford*, and *Sheridan*, were wrongly decided. *Safford* and *Sheridan* applied the rule enunciated in *Ross*, a *per se* rule deeming evidence insufficient for a jury's consideration where a chemist fails to test each individual baggie of cocaine prior to the baggies being combined and weighed, regardless of any other circumstance that would demonstrate the powdery substance was cocaine. The rule in *Ross* ignores the proper rule for **sufficiency** of the evidence which contemplates whether a rationale jury could conclude a substance to be an illegal controlled substance when considering the totality of the circumstances, including the substance's appearance and packaging, the proximity of the packaged substances to one another, the presence of drug paraphernalia, the circumstances that led to the seizure of the substance, an individual's "on-the-

scene remarks identifying the substance," and the positive results of any field tests prior to the combining of multiple baggies. *See Pama*, 552 So. 2d at 311. The conflict cases erroneous strayed from this line of reasoning which appears in the Second District's own precedent. *See id.* (determining the identity of a substance through the circumstances of its discovery and presence).

The Fifth District's decision of *Lyons v. State*, 807 So. 2d 709 (Fla. 5th DCA 2002), illustrates a sufficiency of the evidence analysis and its consistency with established judgment of acquittal jurisprudence. There, Lyons was a passenger in a stopped vehicle when law enforcement officers "discovered, hidden in a cereal box in a grocery bag in the back seat, two bricks of powdered cocaine, weighing together, 813.4 grams." *Lyons*, 807 So. 2d at 710. Lyons was convicted of trafficking in more than 400 grams of cocaine. *Id.* Lyons appealed, arguing "because the cocaine was randomly tested only after the contents of the two bags were commingled, there was insufficient evidence to support his conviction for trafficking in greater than 400 grams of cocaine." *Id.* The Fifth District considered Judge Schwartz's dissent in *Ross* which reasoned that "the positive testing of two of the 92 bags, when viewed with the other evidence, such as the fact that each bag was packaged the same and appeared the same, reasonably supported the inference that each bag also likely contained a mixture of cocaine." *Id.* at 711; *see Ross*, 528 So. 2d at 1241 (Schwartz, C.J., dissenting in part). The

Lyons court found *Ross* to be distinguishable, noting that

> there was testimony presented that the two bricks were of approximately the same size and were otherwise similar in appearance to one another. Given the further fact that they were hidden together in a single taped-up Cornflakes box, it would not be an unreasonable inference to make that both bricks contained a mixture of cocaine.

Lyons, 807 So. 2d at 711.

The reasoning in *Lyons* demonstrates why the unyielding test set forth in *Ross* is inconsistent with judgment of acquittal jurisprudence and legislative policy. In *Lyons*, because the bricks of cocaine were found in close proximity, appeared similar in size, contained similar looking substances, were taped together, and were even in a cereal box in a single grocery bag, it was entirely reasonable for a jury to conclude that they contained the same substance. *Lyons*, 807 So. 2d at 711. However, the *Ross*/*Safford*/*Sheridan* rule would require that **as a matter of law**, a jury would not be able to arrive at that conclusion under those facts because the rule would require that the jury would not be able to consider that case. Thus, when properly viewed considering the totality of the circumstances, there is no question that the evidence is sufficient to present to a jury.

In the present case, a panoply of facts are present from which a jury could reasonably conclude that all of the substances Petitioner claimed ownership of contained cocaine or a cocaine mixture prior to their accumulation for laboratory testing. Officers testified that the cocaine appeared to be an off-white powder that

was packaged in similar packaging that was kept in close proximity to each other, namely nine baggies placed in a larger green bag. *See Pama*, 552 So. 2d at 311. The baggies of cocaine were discovered in close proximity to drug paraphernalia that are "tools of the drug trade," namely a "spoon with cocaine residue on [top of the green bag]" and a digital scale found on the table next to the green bag. *See id.*; *Greenwade*, 80 So. 3d at 374. The cocaine was seized pursuant to a search warrant, making the discovery of cocaine or other illegal substance substances reasonable since the search warrant was predicated upon "mak[ing] a controlled buy from a residence of a controlled substance like cocaine, marijuana and such." (R.IV. 239); *see Pama*, 552 So. 2d at 311. Furthermore, the nine individual packages individually field tested positive for cocaine, adding to the particular reasonableness of a jury's conclusion that they contained cocaine or a cocaine mixture. *See id.* Additionally, Petitioner admitted that the substance was cocaine and that the cocaine was his. (R.IV. 245, 251); *Greenwade*, 80 So. 3d at 372. Petitioner told Detective Bishop "I know why you're here . . . what you are looking for is in the garage" and directed Detective Bishop to the garage. (R.IV. 245); *Greenwade*, 80 So. 3d at 372. When the cocaine was sent to FDLE, Dr. Warniment conducted two different tests, took "sampling[s] from several different areas of the powder" and found "nothing unusual in those observations", and concluded that the sample tested positive for cocaine that weight 234.5 grams.

(R.IV. 291-93); *Greenwade*, 80 So. 3d at 372. These facts sufficiently represent the adequate basis to present the question to the jury since a jury could reasonably and rationally find the existence of the elements of trafficking in cocaine beyond a reasonable doubt based on the testimony of Detective Bishop, Petitioner's confession that the substance was cocaine, and Dr. Warniment's testing and weighing of the cocaine. *See Troy*, 948 So. 2d at 646.

Contrary to the rigid rule set forth in *Ross* and followed by *Safford* and *Sheridan*, circumstantial evidence is sufficient to allow a jury to consider whether a defendant is guilty beyond a reasonable doubt of trafficking in cocaine. *See Lyons*, 807 So. 2d at 711; *Pama*, 552 So. 2d at 311. In fact, both federal and state courts have determined that circumstantial evidence can be admitted and is sufficient to establish the type or amount of a controlled substance. *See United States v. Walters*, 904 F.2d 765, 770 (1st Cir. 1990); *United States v. Meeks*, 857 F.2d 1201, 1204 (8th Cir. 1988); *United States v. Osgood*, 794 F.2d 1087, 1095 (5th Cir. 1986); *United States v. Murray*, 753 F.2d 612, 615 (7th Cir. 1985); *United States v. Harrell*, 737 F.2d 971, 978 (11th Cir.1984); *United States v. Scott*, 725 F.2d 43, 45 (4th Cir. 1984); *United States v. Clark*, 613 F.2d 391, 405-06 (2d Cir. 1979); *United States v. Agueci*, 310 F.2d 817, 828 (2d Cir. 1962); *Commonwealth v. Minott*, 577 A.2d 928, 932 (Pa. 1990); *State v. Worthington*, 352 S.E.2d 695 (N.C. App. Ct. 1987); *People v. Garcia*, 202 N.E.2d 269, 272 (Ill. App. Ct. 1964).

Additionally, utilizing a field test to determine if a suspected substance is an illegal controlled substance can be sufficient to sustain a conviction when considering the surrounding circumstances along with the field test. *See People v. Hagberg*, 733 N.E.2d 1271, 1273-74 (Ill. 2000); *Garcia*, 202 N.E.2d at 272.

Indeed, avoiding an unyielding *per se* test for purposes of judgment of acquittal in favor of a totality of the circumstances analysis is sound policy that does not "constrict [a court's] fact-finding function in regard to the identity of drugs to a strict scientific analysis, but will rather permit the use of common sense and reasonable inferences in the determination of the identity of such substances." *Minnott*, 577 A.2d at 932. Where the State presents either direct or circumstantial evidence or both, the decision is placed properly in the hands of the jury to decide whether a defendant trafficked in a specific amount of cocaine, allowing the jury to determine that it is meritless if packets of powdery substances were combined prior to chemical testing and weighing. *See State v. Huerta*, 727 S.E.2d 881, 887 (N.C. App. 2012); *Worthington*, 352 S.E.2d at 702 (citing *State v. Teasly*, 346 S.E.2d 227 (N.C. App. 1986) and *State v. Horton*, 331 S.E.2d (N.C. App. 1985)); *State v. Dorsey*, 322 S.E.2d 405, 407 (N.C. App. 1984).

Certainly, it would be preferable that each baggie of suspected cocaine is individually chemically tested prior to being combined and weighed. However, while this might be deemed the "best procedure", this procedure alone does not

address the question of **sufficiency** or **admissibility** of evidence. Rather, it addresses the **weight** of the evidence. During closing argument, a defense attorney could argue to a jury that by failing to individually test each bag, the State failed to establish beyond a reasonable doubt that a defendant engaged in trafficking a certain weight of an illegal controlled substance. In turn, the State could argue that the specific circumstances of the case could lead the jury to conclude beyond a reasonable doubt that, although each baggie was not chemically tested, the jury can infer that they contained an illegal drug or mixture containing that illegal drug by considering factors such as the substance's appearance and packaging, the proximity of the packaged substances to one another, the presence of drug paraphernalia, the circumstances that led to the seizure of the substance, an individual's "on-the-scene remarks identifying the substance," and the positive results of any field tests prior to the combining of multiple baggies.[1]

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[1] This factual question could be decided in either the State's favor or a defendant's favor. Indeed, a motion for judgment of acquittal would be granted properly in a case where there is a complete absence of evidence and no reasonable jury could infer that separate packages contained cocaine or a mixture of cocaine. For example, if a small baggie of a white, powdery substance is found in the bathroom of a house which is field tests positive for cocaine is combined with a white, powdery substance found in a baking soda box in the kitchen of a house that does not field test positive for cocaine and the combined mixture chemically tests positive for the presence of cocaine, then judgment of acquittal is likely appropriate because no reasonable jury could infer that the powdery substance

Indeed, this is why Petitioner's argument is flawed. Petitioner asserts that not mandating individual laboratory chemical testing for each package of narcotics for purposes of **sufficiency** of the evidence without considering the entirety of the circumstances "allows officers to seize substances, commingle them, all-the-while, never knowing if one package contains purely a counterfeit substance, and another contains a controlled substance." (IB. 16.) This is simply untrue. As previously mentioned, the State's failure to have a chemist conduct a chemical test on each baggie in a laboratory raises the prospect that the jury, as a **matter of fact**, will conclude that the State has not proven the weight of the substance, placing an inherent risk upon the State for following such a procedure.

Under Petitioner's theory of the First District's opinion in this case, one cannot know whether a discovered substance is truly a controlled substance or a counterfeit substance. Petitioner ignores that, in the reality of the drug trade, those who traffic in drugs do not generally intersperse a controlled substance with a counterfeit substance. As stated by the First District,

> pure cocaine can be (and assuredly is) diluted with other substances to facilitate broader distribution. This policy, we believe, legitimizes the practice of commingling multiple packets for chemical testing and weighing, where the circumstances attending the discovery and

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found in a different location in a baking soda box was cocaine or a mixture thereof without additional evidence.

> seizure of the packets permit the reasonable conclusion that they contained contraband, and perhaps other substances, to be used in illegal drug distribution.

Greenwade, 80 So. 3d at 374.

Furthermore, the differences in packaging or location can always be argued to a jury by the defense as to why the jury should conclude that the State has not met its burden beyond a reasonable double of the weight of the substance or mixture thereof. But the possibility that two packages of a substance have one with real drugs or a mixture thereof and one with fake drugs or cutting agent, which may be quite remote based on the facts of a particular case, is not enough to make the question one of **sufficiency of the evidence** and require removing the question for the jury for determination.

In support of his flawed argument, Petitioner relies on Sections 831.31[2] and

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[2] Section 831.31(2) defines "counterfeit controlled substance" as:

> (a) A controlled substance named or described in s. 893.03 which, or the container or labeling of which, without authorization bears the trademark, trade name, or other identifying mark, imprint, or number, or any likeness thereof, of a manufacturer other than the person who in fact manufactured the controlled substance; or
>
> (b) Any substance which is falsely identified as a controlled substance named or described in s. 893.03.

§ 831.31 (2)(a)-(b), Fla. Stat. (2009).

817.563[3] of the Florida Statues to establish that "look-alike substances or counterfeit narcotics are possessed and sold with such regularity that our legislature drafted criminal statutes proscribing such behavior." (IB. 15-16). However, these statutory provisions do not help Petitioner's cause. The issue is not whether the State proved the substances found in Petitioner's garage were counterfeit drugs. Moreover, it is reasonable to conclude that the cocaine was not counterfeit because the nine baggies were packaged in an identical fashion, there were no distinguishing characteristics of the baggies, and the nine baggies were found together in close proximity.

Petitioner relies on cases that are distinguishable from the present case. Petitioner cites to *L.R. v. State*, 557 So. 2d 121 (Fla. 3d DCA 1990) which presents facts that are not present in Petitioner's case. In *L.R.*, the defendant was adjudicated delinquent for possessing cocaine. *L.R.*, 557 So. 2d at 122. On appeal, the Third District reversed L.R.'s adjudication of delinquency because

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[3] Section 817.563 declares it to be

> unlawful for any person to agree, consent, or in any manner offer to unlawfully sell to any person a controlled substance named or described in s. 893.03[3] and then sell to such person any other substance in lieu of such controlled substance.

§ 817.563, Fla. Stat. (2009).

> the sole evidence identifying the substance was the officer's testimony that, based on his past experience, it appeared to be rock cocaine, and that is field tested positive for cocaine. The officer described the procedure for performing the test but was unable to testify as to the reliability of the test. **No laboratory report was introduced, nor was a chemist called to testify.**

Id. (emphasis added). The Third District relied on *Cabral v. State*, 550 So. 2d 46, 47 (Fla. 3d DCA 1989), where the court reversed a narcotics conviction because the only evidence presented was a detective's testimony that "by looking at them, they look like cocaine rocks." *See also Purvis v. State*, 43 So. 3d 734, 736 (Fla. 2d DCA 2010) (quoting *Ross* for the proposition that a visual examination alone of untested substances is insufficient evidence). The court also relied on *Weaver v. State*, 543 So. 2d 443, 443-44 (Fla. 3d DCA 1989), where the court reversed because the only evidence presented at Weaver's violation of probation hearing was an officer's field test which indicated the substance was heroin and **"[n]o chemist or other qualified technician testified that the substance was heroin**." (emphasis added).

L.R. is distinguishable from the instant case because the State is not contending that for purposes of combining packages of powder cocaine, the rule should be that no chemical testing is required. Rather, the State is arguing that where individual packages of powder cocaine are combined for laboratory testing, the jury may consider the totality of the circumstances to determine if a substance is a controlled substance rather than a *per se* rule mandating individual testing in a

laboratory by a chemist.

Petitioner also points this Court's attention to *Johnson v. State*, 929 So. 2d 4 (Fla. 2d DCA 2005). However, *Johnson* is distinguishable from the instant case. There, Johnson was charged with possession of cocaine among other crimes. *Johnson*, 929 So. 2d at 5. Johnson appealed "on Confrontation Clause grounds, the admission of a Florida Department of Law Enforcement (FDLE) lab report establishing the illegal nature of substances he possessed when **the person who performed the test did not testify**." *Id.* (emphasis added). The Second District noted that "the only evidence identifying [the cocaine] was the field test and the lab report. None of the testifying officers related how they, as experts in drug identification, were able to recognize crack cocaine. The field test alone would have been insufficient to convict Johnson of cocaine possession." *Id.* at 7 n.1. The court found that the FDLE report was testimonial hearsay and certified a question of great public importance to this Court addressing the admission of the FDLE report violating *Crawford v. Washington*, 541 U.S. 36 (2004), when the individual who conducted the laboratory testing did not testify. *Id.* at 8. Accepting jurisdiction and upon review, this Court approved the Second District's decision and answered the certified question in the affirmative. *State v. Johnson*, 982 So. 2d 672, 681 (Fla. 2008).

However, unlike *Johnson*, this case does not involve whether a laboratory

report is hearsay, but instead whether there is a *per se* rule requiring individual laboratory testing in order to prove a powdery substance is cocaine.

In conclusion, a sufficiency of the evidence review requires that a court review **all** the circumstances of a case in the light most favorable to the non-moving party, with all inferences viewed in the non-moving party's favor, and determine whether any reasonable jury could find in favor of the non-moving party. *See Durosseau v. State*, 55 So. 3d at 557; *Baugh*, 961 So. 2d at 204 (Fla. 2007); *Pagan*, 830 So. 2d at 803. This standard does not change when addressing the issue of "whether the trial court should have granted his motion for judgment of acquittal on the cocaine trafficking charge because the state combined, tested and weighed the contexts of nine small bags found in his possession instead of testing each bag for cocaine before commingling and weighing their contents." *Greenwade*, 80 So. 3d at 371. The *per se* rule of *Ross*, followed by *Safford* and *Sheridan*, that mandates individual chemical testing prior to combining multiple packages of suspected cocaine to be weighed together is wrong. Under this line of case law, the State can never meet its burden of establishing by competent and substantial evidence that an individual trafficked in cocaine unless the rigid rule of *Ross* is adhered to without diversion. The proper rule for sufficiency of the evidence is whether a rationale jury could conclude a substance to be an illegal controlled substance when considering the totality of the circumstances, including

the substance's appearance and packaging, the proximity of the packaged substances to one another, the presence of drug paraphernalia, the circumstances that led to the seizure of the substance, an individual's "on-the-scene remarks identifying the substance," and the positive results of any field tests prior to the combining of multiple baggies.

CONCLUSION

Based on the foregoing, the State respectfully requests the decision of the First District Court of Appeal be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the following by ELECTRONIC MAIL to Diana L. Johnson Esq., Assistant Public Defender, at diana.johnson@flpd2.com on this 25th day of October, 2012.

Respectfully submitted and certified,
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirement of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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