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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79910  
[4th DCA No. 91-2482]

STATE OF FLORIDA,  
Petitioner,

vs.

MICHAEL ANTHONY RHODES,  
Respondent.

\*\*\*\*\*

ON PETITION FOR DISCRETIONARY REVIEW

\*\*\*\*\*

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.....	iii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT.....	3
REASONS FOR GRANTING DISCRETIONARY REVIEW.....	4
THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BELOW WHICH HAS CITED AS CONTROLLING AUTHORITY <i>KELLY v.</i> <i>STATE</i> , WHICH IS PENDING REVIEW IN THIS COURT AND WHICH WAS SUBSEQUENTLY CITED IN A CASE WHICH CERTIFIES THE IDENTICAL ISSUE TO THIS COURT AS A QUESTION OF GREAT PUBLIC IMPORTANCE.	
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Jollie v. State,</u> 405 So.2d 418 (Fla. 1981).....	5
<u>Kelly v. State,</u> 593 So.2d 1060 (Fla. 4th DCA 1990).....	3
<u>Rhodes v. State,</u> Case No. 91-2482 (Fla. 4th DCA May 13, 1992).....	2
<u>Spradley v. State,</u> 293 So.2d 697, 701 (Fla. 1974).....	8
<u>State v. Bass,</u> 451 So.2d 986 (Fla. 2d DCA 1984).....	6
<u>State v. Brown,</u> 475 So.2d 1 (Fla. 1985).....	5
<u>State v. Kelly,</u> Case No. 79,280.....	3
<u>State v. Glosson,</u> 462 So.2d 1082 (Fla. 1985).....	7
<u>Williams v. State,</u> 17 FLW D406 (Fla. 4th DCA Case No. 90-1778, Feb. 5, 1992).....	4

FLORIDA STATUTE

§893.02(12)(a), Fla. Stat. (1989).....	7
Section 893.13(1)(e), Fla. Stat. (1989) (A 1).....	2

OTHER AUTHORITIES

<u>Fla. R. App. P. 9.030(a)(2)(A)(ii).....</u>	7
<u>Fla. R. App. P. 9.120(d).....</u>	2

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellant and the defendant, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Petitioner's Appendix to this brief.

### STATEMENT OF THE CASE AND FACTS

Respondent was charged with, and convicted of, purchase of cocaine within 1,000 feet of a school in violation of Section 893.13(1)(e), Fla. Stat. (1989) (A 1). On appeal from the conviction, Respondent raised as error the state's exercise of a peremptory challenge and the court's instruction on entrapment. After the state's answer brief was filed, the Respondent motioned the court to file a supplemental brief raising the issue of the manufacture and distribution of crack cocaine by police officers. The Fourth District denied Respondent's motion to file the supplemental brief, but instead treated it a Notice of Supplemental Authority.

In the slip opinion published as Rhodes v. State, Case No. 91-2482 (Fla. 4th DCA May 13, 1992), the District Court of Appeal, Fourth District, held:

The record demonstrates that the crack cocaine purchased by appellant from an undercover Broward County Sheriff's officer during a reverse sting was manufactured by the Broward County Sheriff's Office. Therefore we reverse appellant's conviction and sentence on the authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1990).

In the case at bar, the State filed a Notice to Invoke the Discretionary Jurisdiction of this Honorable Court on May 15, 1992. Thus, pursuant to Fla. R. App. P. 9.120(d) this Brief on Jurisdiction follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision in the instant case cited as controlling authority Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1990), which is now pending review in this Court. State v. Kelly, Case No. 79,280. Subsequently, in Williams v. State, 4th DCA Case No. 90-1778, the Fourth District reversed Mr. Williams' conviction for purchase of cocaine within 1,000 feet of a school on the authority of Kelly; it then certified to this Court a question of great public importance:

DOES THE SOURCE OF ILLEGAL DRUGS USED BY  
LAW ENFORCEMENT PERSONNEL TO CONDUCT  
REVERSE STINGS CONSTITUTIONALLY SHIELD  
THOSE WHO BECOME ILLICITLY INVOLVED WITH  
SUCH DRUGS FROM CRIMINAL LIABILITY?

Since this Court has jurisdiction of Williams, it also has jurisdiction to review the decision in the case at bar which presents the identical issue. Article V, §3(b)(4), Florida Constitution.

REASONS FOR GRANTING DISCRETIONARY REVIEW

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BELOW WHICH HAS CITED AS CONTROLLING AUTHORITY *KELLY v. STATE*, WHICH IS PENDING REVIEW IN THIS COURT AND WHICH WAS SUBSEQUENTLY CITED IN A CASE WHICH CERTIFIES THE IDENTICAL ISSUE TO THIS COURT AS A QUESTION OF GREAT PUBLIC IMPORTANCE.

Article V, §3(b)(4) of the Florida Constitution empowers this Court to review any decision of a district court of appeal which certifies to this Court a question of great public importance. The present case cited as controlling authority *Kelly v. State*, which was cited as controlling authority in a subsequent case in *Williams v. State*, 17 FLW D406 (Fla. 4th DCA Case No. 90-1778, Feb. 5, 1992). In *Williams* the Fourth District certifies the identical issue to this Court as a question of great public importance.

*Williams* is now pending review in this Court. In that case, the district court reviewed the identical scenario as in *Kelly v. State* and the case at bar. The *Williams* Court, citing *Kelly* as controlling authority, reversed the conviction for purchase of "illegally manufactured" cocaine within 1,000 feet of a school. The District Court in *Williams*, as it did in *Kelly*, held that the Broward County Sheriff's practice of reconstituting powdered cocaine into crack cocaine constituted a violation of the defendant's due process. The District Court,

however, on rehearing in Williams certified the issue as one of great public importance:

DOES THE SOURCE OF ILLEGAL DRUGS USED BY  
LAW ENFORCEMENT PERSONNEL TO CONDUCT  
REVERSE STINGS CONSTITUTIONALLY SHIELD  
THOSE WHO BECOME ILLICITLY INVOLVED WITH  
SUCH DRUGS FROM CRIMINAL LIABILITY?

Although Williams certified the question prior to the reversal of the case at bar, the Fourth District declined to certify the identical issue in this case as well. However, it is obvious from the face of the District Court's decision in this case that the identical issue is involved in Kelly, Williams, and the case at bar.

Article V, §3(b)(4) of the Florida Constitution gives this Court jurisdiction to review a question of great public importance. Therefore, this Court clearly has jurisdiction in Williams. Moreover, since Williams is pending in this Court in Case No. 79,507, this Court has jurisdiction to review the District Court's decision in the case at bar. State v. Brown, 475 So.2d 1 (Fla. 1985); Jollie v. State, 405 So.2d 418 (Fla. 1981).

Where it is clear from the face of the opinion that the petitioner's case involves the identical legal issue certified to be a question of great public importance in a another case, this Court's jurisdiction is also properly invoked on petitioner's behalf on the basis of the certified question in the other case. State v. Brown.

Moreover, the instant case presents an issue which this Court should resolve. The reversal of the conviction in the



case at bar was based on its prior decision handed down in Kelly. A review of the opinion in Kelly v. State, created conflict by announcing a rule of law contrary to that announced in State v. Bass, 451 So.2d 986 (Fla. 2d DCA 1984).

In Bass, federal authorities supplied the Tampa Police Department with marijuana for use in reverse stings after a federal magistrate had ordered the marijuana destroyed. Id., 451 So.2d at 987-988. In discounting Bass' argument that the authorities' alleged illegal use of the marijuana in the sting operation should preclude his prosecution, the Second District Court of Appeal stated:

It may be that the federal authorities were subject to sanction for permitting the Tampa Police Department to use the marijuana. However, the Tampa police acted in good faith. The federal agents who furnished the marijuana told the officers that it was permissible to use the marijuana in a "reverse-sting" operation before it was destroyed. The propriety of such advice in no way diminishes the illegality of appellee's conduct.

(Emphasis added.)

Id., 451 So.2d at 988.

In Kelly, the Fourth District found that the actions by the police in "manufacturing" the crack precluded Kelly's prosecution on due process grounds. Thus, it is clear that there is express conflict on the face of the opinion in Bass and the Fourth District's opinion in Kelly. As Judge Hersey stated in his dissent in Kelly, 17 FLW D154:

It is one thing to express righteous indignation over the fact that police illegally "manufacture" drugs in the first instance and then, in the second

instance, allow some of those drugs to escape into the community. It is quite another thing, however, to suggest that one who buys such drugs right to due process has been violated by that activity.

It is abundantly clear that Respondent went to the location to buy cocaine from whoever was selling it. Respondent would have purchased the crack cocaine whether the reverse sting was taking place with "illegally manufactured" cocaine from the police, or from another "illegal" seller of cocaine.

Further, in Kelly, the District Court held that the Sheriff of Broward County acted illegally in manufacturing crack from seized cocaine, in contravention of §893.02(12)(a), Fla. Stat. (1989). The court held "[s]uch police conduct cannot be condoned and rises to the level of a violation of the constitutional principles of due process of law"; citing to State v. Glosson, 462 So.2d 1082 (Fla. 1985). Since Glosson construes both the Florida and federal due process clauses, this Court has jurisdiction to review this case under Fla. R. App. P. 9.030(a)(2)(A)(ii).

Additionally, Sheriffs are both constitutional and state officers. See Article VIII, Section 1(d) of the Florida Constitution, and Chapter 30, Fla. Stat. State attorneys are also constitutional and state officers. See Article V, Section 17 of the Florida Constitution and Chapter 27, Fla. Stat. The decision below directly and exclusively affects the authority of Sheriffs to use reconstituted crack cocaine in reverse sting operations, and State Attorneys to prosecute persons arrested in such operations. Thus, this is sufficient to invoke this

Court's certiorari jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iii), where the District Court's opinion directly and exclusively affected the duties, powers, validity, formation, termination or regulation of a particular class of officers. Spradley v. State, 293 So.2d 697, 701 (Fla. 1974).

By virtue of the Fourth District's citation to Kelly as the controlling case in the case at bar, and by virtue of the Fourth District's citation to Kelly in Williams, and by virtue of the Fourth District's certification of the issue as a question of great public importance in Williams, the State submits that since Williams is pending review before this Court on the exact same issue, this Court should accept jurisdiction to review the opinion of the District Court in the case at bar. State v. Brown; Jollie v. State.

The State submits that sound policy reasons exist for this Court to exercise its discretionary review jurisdiction over this case to correct the adoption of an erroneous rule of law by the District Court in the case at bar.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests this Honorable Court ACCEPT discretionary jurisdiction in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
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Tallahassee, Florida

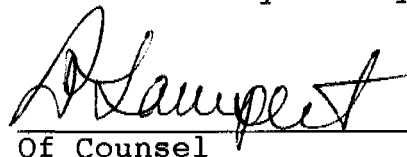


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Brief of Petitioner on Jurisdiction" has been furnished by courier to: TANJA OSTAPOFF, Assistant Public Defender, Counsel for Respondent, 9th Floor/Governmental Center, 301 N. Olive Avenue, West Palm Beach, FL 33401 this 22nd day of May, 1992.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY RHODES,

Petitioner ,

vs.

CASE NO. \_\_\_\_\_

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

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A P P E N D I X

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT  
JANUARY TERM 1992

MICHAEL ANTHONY RHODES, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

CASE NO. 91-2482.

Opinion filed May 13, 1992

Appeal from the Circuit Court  
for Broward County;  
Mark A. Speiser, Judge.

Richard L. Jorandby, Public  
Defender, and Tanja Ostapoff,  
Assistant Public Defender,  
West Palm Beach, for appellant.

Robert A. Butterworth, Attorney  
General, Tallahassee, and  
Patricia G. Lampert, Assistant  
Attorney General, West Palm Beach,  
for appellee.

NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.

PER CURIAM.

Appellant brings this appeal from his conviction for purchase of cocaine within 1,000 feet of a school. The record demonstrates that the crack cocaine purchased by appellant from an undercover Broward County Sheriff's officer during a reverse sting was manufactured by the Broward County Sheriff's Office. Therefore we reverse appellant's conviction and sentence on the authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1990),

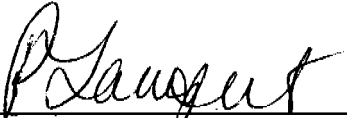
and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992). This case is remanded to the trial court with directions to discharge appellant.

REVERSED and REMANDED.

GLICKSTEIN, C.J., GUNTHER and POLEN, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix" has been furnished by courier to: **TANJA OSTAPPOF**, Assistant Public Defender, Counsel for Respondent, 9th Floor/Governmental Center, 301 N. Olive Avenue, West Palm Beach, Florida this 22nd day of May, 1992

  
\_\_\_\_\_  
Of Counsel

/br