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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL ANTHONY RHODES,

Respondent.

Case No. 79,910

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner was the appellee and the prosecution, respectively, in the lower courts.

In the brief, the parties will be referred to by name.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Mr. Rhodes accepts the State's statements of the case and facts.

SUMMARY OF ARGUMENT

This Court should decline to exercise its jurisdiction in the instant case. No question was certified by the district court in the instant case and the question certified in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992), which was not referred to by the district court below, is far broader than the one presented, and in fact is so broad it cannot be answered on this record. Furthermore, the actual issue presented here is one which the district court was fully capable of answering and did answer. Unless and until another district court addresses the issue, there is no showing that the case is of state-wide importance. Neither is this a case presenting a new or developing area in the law. This Court should therefore decline to answer the question and instead allow the district court to function as it was intended, as a court of final appeal.

Should this Court decide to exercise its discretion by addressing the instant case, the Court should rephrase the question and affirm the district court's decision. The police conduct of manufacturing and distributing crack cocaine, as conducted in this instance, was so outrageous as to violate the due process clause of the Florida Constitution as well as the narrower due process clause of the United States Constitution.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT HELD THAT MR. RHODES'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE BROWARD COUNTY SHERIFF'S OFFICE'S USE OF CRACK COCAINE ROCKS WHICH IT HAD ILLEGALLY MANUFACTURED AND THEN DISTRIBUTED.

The issue presented to the district court of appeal was whether the trial court erred in refusing to dismiss an information for purchase of cocaine within 1,000 feet of a school where Mr. Rhodes claimed his due process rights were violated by the outrageous conduct of the Broward County Sheriff's Office who illegally manufactured the crack cocaine and then offered it for sale within a school zone. Without discussion, the court reversed and remanded for proceedings consistent with Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992). In Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992), the Fourth District Court of Appeal certified the following question:

> 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 v. State, supra, was never referred to by the district court in the present case, it is presently pending review in this Court[1] and forms the basis for the State's assertion of jurisdiction over Mr. Rhodes's appeal.

In Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court held that it has jurisdiction over district court decisions that cite as controlling authority a decision that is pending review in this Court. But Williams, supra, is not cited as controlling authority

[1]Case No. 79,507.

in the instant case. Jollie does not, therefore, authorize a finding that this Court has jurisdiction in the present case.

Moreover, even if this Court's acceptance of jurisdiction in Williams were sufficient to activate the jurisdictional basis announced in Jollie, Mr. Rhodes contends that this Court should exercise its discretion, granted by Article V section 3(b)(4) of the Florida Constitution, in favor of declining to review this cause. In Lake v. Lake, 103 So.2d 639 (Fla. 1958), this Court detailed the history of the creation of district courts of appeal and the resulting limits placed on this Court's jurisdiction to prevent the district courts "becoming way stations on the road to the Supreme Court." Id. at 641-642. Though the Lake court was addressing a different avenue to Supreme Court review[2], the theme behind the decision is applicable sub judice:

> *They (district courts) are and were meant to be courts of final, appellate jurisdiction.* Diamond Berk Insurance Agency, Inc., v Goldstein, Fla., 100 So.2d 420; Ansin v. Thurston, Fla., 101 So.2d 808. If they are not considered and maintained as such the system will fail. Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

Id. at 642. And though the probe here may be with the consent of the district court and unquestionably within the power of this

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[2] The court's power to accept jurisdiction by looking behind a per curiam affirmed decision, has of course since been limited by further constitutional amendment.

Court, it appears that ever more and more questions are being certified as being "of great public importance."[3] The ever-growing number of certified questions could certainly be viewed as a trend away from the district courts view of themselves as courts of final, appellate jurisdiction.

Understandably, the loser in the district court wants one more shot, and requests certification. But as the Lake court noted,

> ...(W)hen a party wins in the trial court he must be prepared to face his opponent in the appellate court, but if he succeeds there, he should not be compelled the second time to undergo the expense and delay of another review.

Id. The requested review sub judice is nothing more than a second appeal.

Further, the certified question raised as the basis for the instant action does not present such an unresolved and important legal issue that it requires more than the decision of the district court. Stein v. Durby, 134 So.2d 232 (Fla. 1961). See P. J. Padovano, Florida Appellate Practice § 2.11, pg. 27 (1988):

> For example, Section 3(b)(4) has been used as a jurisdictional basis to resolve important issues such as the right of privacy to be afforded a potential AIDS victim, Rasmussen v. South Florida Blood Service, Inc., 500 So.2d 533 (Fla. 1987); "seat belt evidence" in comparative negligence cases, Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984); "right to Die" issues, John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So.2d 921 (Fla. 1984); and issues concerning interspousal immunity, Hill v. Hill, 415 So.2d 20 (Fla. 1982).

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[3] The office of the clerk of the Supreme Court reports that 88 questions were certified in 1988, 102 in 1989, 151 in 1990 and 189 in 1991.

By contrast, the district court in Kelly v. State, supra, and therefore sub judice, was not required to initially construe Florida's due process clause; that had been done by this Court in State v. Glosson, 462 So.2d 1082 (Fla. 1985). Instead the court had only to apply the existing construction to a new and different factual scenario to reach a conclusion. That is exactly what district courts of appeal were created to do. And unless and until another district court addresses the same issue and resolves it differently, there is no showing that the issue here is of such statewide importance that only this Court should resolve it. Mr. Rhodes therefore urges this Court to exercise its discretion by declining to accept jurisdiction here.

However, if this Court decides to exercise its discretion by accepting jurisdiction, Mr. Rhodes urges the Court to reframe the question to the narrow one properly presented by the facts of the instant prosecution, and to affirm the decision of the district court below.

The instant case was reversed based on Kelly v. State, supra. In that case, the district court was presented with the following scenario: The Broward County Sheriff's Office decided to conduct a reverse sting operation in which they would pose as sellers of crack cocaine. They set their operation up within 1,000 feet of various schools so that any purchaser arrested would upon conviction be sentenced to a mandatory minimum sentence of three years in prison. The crack cocaine which Mr.. Rhodes was charged with purchasing was manufactured by the police, namely the Broward County Sheriff's Office Laboratory by chemist Randy Hilliard. Hilliard was making crack cocaine pursuant to orders from Sheriff

Nick Navarro. Some 1,200 rocks were manufactured per batch; multiple batches were produced. The amount manufactured well exceeded 28 grams. To make cocaine rocks Hilliard would take powdered cocaine which was ordered to be destroyed and he would boil it with baking soda until the elements combined so that it was no longer water soluble. At that point, he would pour off the remaining water, pour the cocaine and soda mixture into pans, cool it until it crystallized, cut it into pieces, and package it first in individual, then in multiple, heat sealed packets. The laboratory where the rocks were manufactured was within 1,000 of Southside School. The rocks were distributed by the police, but some of them have not been recovered. Indeed, the chemist in Kelly could only account for 271 rocks of the 576 which were checked out. Though there was no claim that all those rocks were actually lost, the chemist agreed that the sale of some of the rocks did not result in arrest, and those rocks were actually distributed for illegal use; but for the action of the sheriff's office, those rocks would not have been in circulation, the cocaine would have been destroyed.[4] Kelly v. State, supra. It was the combination of the specific facts of Kelly that resulted in the district court's ultimate finding of outrageous conduct.

The following Florida Statutes (1987) are involved: Florida Statute 893.13(1)(e) prohibits the sale, purchase, manufacture, or delivery of a controlled substance within 1,000 feet of a school except as authorized by the statute. Florida Statute 893.13(4)

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[4] The potential for corruption in this sordid scheme can hardly be ignored as well.

then provides the exceptions. Florida Statute 893.13(4)(b) excepts "the actual or constructive possession of controlled substances" by officers of state, federal, or local governments in their official capacity, including their informants. Florida Statute 893.13(4)(c) also excepts "the delivery of controlled substances" by law enforcement in the course of a criminal investigation. The statutory scheme is clear: possession or delivery of controlled substances is authorized in certain instances but there is no statutory authority for the police or anyone else to manufacture crack cocaine.

There can be no avoidance of this problem by claiming that reconstituting powder cocaine to crack cocaine (is) not illegal manufacture of contraband. If the State were correct, then it is impossible to manufacture crack, as it all starts out as powdered cocaine; the only persons guilty of manufacturing would be the labs (mostly offshore) which convert the leaves to powder. If undersigned made a similar claim while representing Joe Defendant's kitchen crack lab it would be laughed out of court. Obviously that is not what the legislature intended when it defined the word manufacture in section 893.02(12)(a), Florida Statutes (1987):

> "Manufacture" means the production, preparation, propagation, compounding, cultivating, or growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of original origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container...

Clearly the legislature has prohibited "reconstituting" powder cocaine into its lethal cousin, crack. Just as clearly, the

legislature did not authorize police agencies to set-up a manufacturing operation. Such conduct is illegal; the legislature has spoken.[5] In the instant case, the illegal manufacturing of the crack cocaine and its manner of distribution constituted outrageous police conduct and thus violated due process as the district court found.

The due process clauses of the Federal and Florida Constitutions protect our citizens from the outrageous conduct of law enforcement agents. At least two federal courts have reversed convictions on the basis of outrageous police conduct involving the manufacture of contraband. For example, in Greene v. United States, 454 F.2d 783 (9th Cir. 1971), the defendants were charged with illegal manufacture of alcohol. An undercover agent had supplied sugar at wholesale prices, an operator, and a still. The court overturned the conviction because the police misconduct in the manufacturing of illegal alcohol had violated due process.

In United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), the defendants were charged with manufacture of methamphetamine hydrochloride -- i.e. "speed." A Drug Enforcement Agency (DEA) informant, as part of a plea bargain, involved the defendants in setting up a laboratory. The government supplied about twenty percent of the glassware and phenyl-2-propanone (an indispensable ingredient). The informant purchased a majority of the materials needed. The government also provided a production site. The court overturned Twigg's conviction due to outrageous police conduct of

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[5] If the State believes the clear legislation intended otherwise, its forum is before the legislature, not this Court.

participating in criminal activity which constituted a due process violation. Contrary to the State's claim, United States v. Beverly, 723 F.2d 11 (3d Cir. 1983), does not expressly limit Twigg nor does it recede from the conclusion there.

The situation at bar is even more outrageous and egregious than that outlined in the factual cases above. Here the illegal manufacturing was solely the result of police actions thus creating a very dangerous drug, crack. Through the laws of Florida, the police are entrusted to prevent the creation of the very drug they manufactured. The police then distributed the crack cocaine on the streets, some of which was never recovered and presumably is causing the dangers which the drug laws were intended to prohibit. Indeed, the concurring opinion in Kelly correctly notes that crack is "worlds apart" from its powdered cousin. While hydrochloride powder is 10-60% pure and when inhaled takes several minutes to reach the brain, crack is almost pure cocaine and reaches its target in seconds. *Cocaine and the Cocoa Plant.* D. Boucher. BioScience, vol. 41, no. 2, 72-76, Feb. 1991. Perhaps that in part explains reports of near instant addiction to crack. The possibility of a fatal overdose reaction (sudden death by triggering chaotic heart rhythm, seizure or stroke) to cocaine is much greater with crack because of the large dose of the drug that is delivered directly to the brain. *Cocaine's Harmful Effects.* Science vol. 248: 166, Apr. 13, 1990; Mark S. Gold, M.D., 800-COCAINE, Bantam Books 1984; *The Facts About Drugs and Alcohol*, M.S. Gold, M.D., Bantam Books 1986.

Assuming arguendo that the due process clause of the federal constitution is not violated by the police conduct of engaging in

the illegal manufacture of crack cocaine,[6] this Court has made it clear that the Florida Constitutions's Due Process Clause is not as narrow as the federal due process clause:

> We reject the narrow application of the due process defense found in the federal cases. Based upon the due process provision of article I, section 9 of the Florida Constitution, we agree with *Hohensee* and *Isaacson* that governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges.

State v. Glosson, 462 So.2d 1082, 1085 (Fla. 1985). One of the cases cited with approval in Glosson was State v. Hohensee, 650 S.W.2d 268 (Mo.Cr.App. 1982). In Hohensee, the police sponsored and operated a burglary. The defendant acted as a lookout during the burglary. His conviction was reversed because the police actions of the creation of new crime was held to be a violation of due process. Reversal was required even though the defendant was predisposed to participate in the offense. Again, the situation at bar in creating new crime is just as outrageous, if not even more outrageous.[7] If due process can be violated, it was violated by the police conduct in this case. Dismissal was appropriate because that is the only real check on the government's conduct.

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[6] In Twigg, supra, the Ninth Circuit noted that in other federal cases indicating some police involvement in manufacturing, as in United States v. Leja, 563 F.2d 244 (6th Cir. 1977), reversals were not warranted. In Twigg, the court distinguished the other cases on grounds that it was the defendants who concocted the manufacturing scheme in those cases.

[7] Certainly, the manufacturing of crack cocaine is more egregious conduct than committing a burglary. The misconduct here is aggravated by the distribution of the crack cocaine without later being able to recover it from the streets.

The State argues that Mr. Rhodes "would have purchased crack cocaine from someone, whether or not the reverse sting was taking place." Petitioner's initial brief on the merits at 7. But as this Court noted in Glosson, due process can be violated, "regardless of the defendant's predisposition." 462 So.2d at 1085. Further, Mr. Rhodes flatly denies the State's claim. Mr. Rhodes testified that he was not a crack user and indeed he never wished to buy crack in this instance. Mr. Rhodes claimed more than entrapment here, he claimed that the drugs were practically thrust upon him in the officers' zeal to put their preprinted probable cause forms and all that went with them to use (R 230, 232-233, 235). There was certainly no proof of predisposition.

The State also argues that this case is controlled by State v. Bass, 451 So.2d 986 (Fla. 1984), a case which does not even mention a due process argument. Factually the cases are very different, and in a due process argument it is the facts which create the conclusion that a specific scenario is or is not outrageous. Bass involved charges of trafficking in marijuana and conspiracy. The marijuana was furnished by the police in a typical reverse-sting operation, wherein a large and easily controlled quantity of drugs at all times remains in the possession of police officers or agents. Not so the case at bench wherein thousands of tiny new crack rocks have been created and, in some cases, actually distributed into the community. Obviously the ability or inability to control the drugs, plus their new creation here, makes Bass a different case. It is also interesting to note that after Bass was decided, the legislature amended chapter 893 to allow possession and delivery by the police, but still chose not to include

manufacturing as a law enforcement exception. Of course Bass was also decided prior to Glosson and on a different theory. Thus Bass cannot fairly be described as either controlling or conflicting with the instant decision.

It has been said that police sometimes must perform as "actors" and deliver lines and use props in their investigations. However, that dramatic license must end when the officers' actions go beyond the limits of the stage. The police misconduct of manufacturing crack cocaine is outrageous and goes well beyond all limits of the stage. Moreover, the results of the outrageous manufacturing endangers the audience -- i.e. society. Finally, Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed.2d 944 (1928), eloquently states part of the problem involved in police committing crimes:

> Decency, security, and liberty, alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

If such a problem ever existed, it exists here. In the present case the police activity violates the Due Process Clause of the Florida Constitution, as the district court correctly held. Article I, section 9, Florida Constitution. Additionally, it

violates the United States Constitution. Fifth and Fourteenth Amendments, United States Constitution. Moreover, the error presented here is fundamental, contrary to the State's summary denial at page 7 of its initial brief on the merits. In Grissett v. State, 594 So.2d 321, 322 (Fla. 4th DCA 1992), the Fourth District Court of Appeal correctly observed that this Court has itself defined the scope of fundamental error in Ray v. State, 403 So.2d 956 (Fla. 1981):

> This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not presented below, the error must amount to a denial of due process. Castor v. State, 365 So.2d 701, 704 n. 7 (Fla. 1978). See State v. Smith, 240 So.2d 807 (Fla. 1970).

Since the denial of due process by outrageous police conduct is precisely the basis for the claim made in this case, it is evident that permitting prosecution for the purchase of crack cocaine manufactured by a law enforcement agency is fundamental error requiring reversal even where it has not been raised below. Even should this Court determine that it has jurisdiction over this cause, then, the decision of the Fourth District Court of Appeal in the present case must be affirmed in all respects.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Mr. Rhodes respectfully requests this Court to decline to accept discretionary jurisdiction or uphold the opinion of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 4th day of September, 1992

Counsel for Respondent