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IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. RONALD PALMER, Respondent.	No. 80,080

BRIEF OF RESPONDENT ON THE MERITS

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<u>**PRELIMINARY STATEMENT**</u>

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 as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement with the exception of the following additions and corrections:

The information charged that the offense occurred on September 20, 1989, not 1988 (R 428).

The actual argument made by Respondent below in the district court was that the outrageous police conduct in illegally manufacturing the crack cocaine constituted a violation of his due process rights under the state and federal constitutions.

The record does not reveal that drugs were not lost even on the one evening that resulted in Respondent's arrest (R 139). Although this record may not affirmatively reflect that any drugs were lost on that one night, the entire operation of Project CRADLE [a reverse sting operation utilizing crack cocaine manufactured by the sheriff's office] is what was found to be illegal in Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992), review denied, Case No. 79,280 (Fla. June 2, 1992).

In Palmer v. State, 17 F.L.W. D1286 (Fla. 4th DCA May 20, 1992), jurisdiction pending, Case No. 80,080, the district court wrote that it did not consider the state's argument that the record in Palmer did not reflect that any drugs were lost to the streets to be a sufficient basis for an exception to Kelly. Indeed, the district court noted that "clearly the result in Kelly is based on the issue of illegality and not on the escape of a portion of the drugs into the community. Obviously, concern for the loss of some of the drugs to the street applies equally to those drugs which

were legally confiscated and used in a 'sting' operation, as well as to those illegally manufactured." Id. at D1287.

According to Respondent's review of the case file, in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992), jurisdiction pending, Case No. 79,507 (Fla. July 6, 1992), technically review is not pending as Petitioner asserts. Although this Court has scheduled oral argument after briefing in Williams, this Court has never entered an order accepting jurisdiction.

Petitioner's brief fully outlined the state's case but failed to include the evidence presented by Respondent which is as follows: Respondent initially went to the area to purchase cocaine for the first time. He had never been there before but he had been told that you could buy cocaine there. He did not know there was a school in the area, nor could he see the school (R 269). He was driving down the street when a black male motioned him over. The black male approached his car and asked him if he wanted a dime. He told the man he had $9.00 and the man said $9.00 would be enough (R 270-271). At that point Respondent became scared and felt something was wrong. He began to think about his family and his girlfriend and her children and he just decided it was not right and he wanted to leave. He told the man that he did not want to purchase the cocaine. At that point the man dropped the rock into his car and tipped his hat. He had no opportunity between the time that he told him he wanted to leave and when he dropped the rock to leave the area (R 272). At that point four or five officers put guns to his head and began to drag him out of his car. He never

took possession of the cocaine, nor did he ever give Jackson any money. The money was in his hands (R 273). After they got him out of the car and took him around to the trunk and they were searching him, they took the money from his hands (R 274). Respondent testified he never thought of trying cocaine until that day (R 275-276). The reason why he had such a strong memory of what went on was because that was the first time anything like that had ever happened to him (R 293).

SUMMARY OF THE ARGUMENT

This Honorable Court should decline to exercise its jurisdiction in the instant case. The question certified by the district court 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 statewide 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 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 RESPONDENT'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 Mr. Palmer's due process rights were violated by his conviction for purchase of cocaine within 1,000 feet of a school based on the outrageous conduct of the Broward County Sheriff's Office which illegally manufactured the crack cocaine and then offered it for sale within a school zone. The court reversed and remanded for proceedings consistent with Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992), review denied, Case No. 79,280 (Fla. June 2, 1992), and Grissett v. State, 594 So.2d 321 (Fla. 4th DCA 1992), review dismissed, Case No. 79,664 (Fla. May 29, 1992). The court also certified the following question which it had previously certified in Williams v. State, 593 So.2d 1064 (Fla. 4th DCA 1992), jurisdiction pending, Case No. 79,507 (Fla. July 6, 1992):

> 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?

Clearly the question certified is far broader than the very narrow, fact-oriented question presented to the district court by this case.

Respondent 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 answer the certified question presented here.

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 from "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[1], 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 Court, it appears that ever more and more questions are being

[1] 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.

certified as being "of great public importance."[2] 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 chance to prevail, 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.

The certified question presented here is, as Respondent has shown, far broader than this case can or should answer. But more importantly, it 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,

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[2] 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.

> 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).

By contrast, the district court in Kelly v. State, 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 district 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. 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. Respondent therefore urges this Court to exercise its discretion by declining to accept jurisdiction.

However, if this Court decides to exercise its discretion by accepting jurisdiction, Respondent urges the Court to reframe the question to the narrow one presented here, and to affirm the decision of the district court.

As set forth above, the instant case was reversed based on Kelly v. State and Grissett v. State. In Kelly, 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 Respondent 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 arrests, 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 and the cocaine would have been destroyed.[3] Kelly v. State. It was the combination of the specific facts of the operation as set forth in Kelly that resulted in the district

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

court's ultimate finding of outrageous conduct. In Grissett v. State the district court held that the outrageous police misconduct determined to be illegal in Kelly constituted fundamental error.

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

The legislature defined the word manufacture in Section 893.02(12)(a), Florida Statutes:

> "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 ...

(Emphasis supplied). 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. 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 participating in criminal activity which constituted a due process violation. Contrary to Petitioner'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 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, and as set out in Kelly, some of it 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. Kelly v. State, 593 So.2d at 1063 (Letts, J., concurring). While hydrochloride powder is 10-60 percent 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, pp. 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, pg. 166, April 13,

1990; Mark S. Gold, M.D., 800-COCAINE, Bantam Books 1984; M.S. Gold, M.D., The Facts About Drugs and Alcohol, 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,[4] this Court has made it clear that the due process clause of the Florida Constitution 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 rights 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) (emphasis supplied). 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 action of creating 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

[4] In Twigg, 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.

new crime is just as outrageous, if not even more outrageous.[5] If due process can be violated, it was violated by the police conduct in this case.

Petitioner argues that Respondent "implicitly admitted that he would have purchased crack cocaine from someone, whether or not the reverse sting was operational" by his failure to argue to the lower court that he was the subject of improper police conduct. Petitioner's brief at 9. But as this Court noted in Glosson, due process can be violated "regardless of the defendant's predisposition." 462 So.2d at 1085. Further, Respondent flatly denies Petitioner's claim. Respondent testified that he was not a crack user. Indeed he ultimately decided he did not wish to buy crack in this instance [although his testimony was contrary to the police version of the events] (R 269, 272-276, 293).

Although as noted in Petitioner's statement of the case and facts, there was no motion to dismiss presented to the trial court below on the grounds raised on appeal, Petitioner curiously maintains that the "trial court's refusal to dismiss the charge against respondent was correct" and that it is supported by a federal court of appeals case. Petitioner's brief at 7.

Petitioner claims that this case conflicts with this Court's decision in Smith v. State, 17 F.L.W. S213 (Fla. April 2, 1992), as to preservation. Petitioner is incorrect. Smith concerned the

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[5] 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.

retrospective application of a decision of this Court. This Court held that "To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." Id. at S214 (emphasis supplied). Thus, Smith clearly holds that an objection is only required under those circumstances if the error is not fundamental. At bar, the district court determined that the error was fundamental, relying on its previous decision under identical circumstances in Grissett v. State, 594 So.2d 321 (Fla. 4th DCA 1992), review dismissed, Case No. 79,664 (Fla. May 29, 1992). Significantly, Petitioner has not argued in its brief on the merits that the district court was in error in determining that this was a case of fundamental error, which does not require an objection below to preserve the issue for appellate review. Thus, the instant case certainly does not conflict with this Court's holding in Smith v. State.

Petitioner also argues that this case conflicts with State v. Bass, 451 So.2d 986 (Fla. 2d DCA 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 in the scenario at bench wherein

thousands of tiny new crack rocks have been created and, in some cases, actually distributed into the community. See Kelly. 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 conflicting with the instant decision.

Further, Petitioner asks this Court to find persuasive its claim that six judges and two senior judges of the district court have indicated their disagreement with Kelly and its progeny. Petitioner's brief at p. 10. Respondent submits that is not necessarily the case. There is no showing that all of the six unnamed judges who were originally in disagreement with the result in Kelly have continued to maintain that position. Regardless, the issue is well-settled in the district court. All panels of the district court continue to rely on Kelly and Grissett and to repeatedly deny stays of mandate or rehearing on this issue.

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. 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.

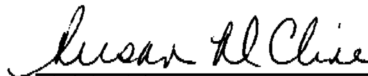
If such a problem ever existed, it exists here. In the present case the police activity violates the due process clause of the Florida Constitution as the district court correctly held. Art. I, § 9, Florida Constitution. Additionally, it violates the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

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

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, and John Tiedemann, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 31st day of August, 1992.

Of Counsel