IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,477

STATE OF FLORIDA,

Petitioner,

vs.

DAVID JAMES NERO,

Respondent.

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, DAVID JAMES NERO, was the Appellant in the Fourth District Court of Appeal and the Defendant, respectively, in the trial court. The Petitioner was the Appellee and the Plaintiff, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court. References to the record will be preceded by "R." All emphasis has been added by Respondent.

SUMMARY OF THE ARGUMENT

The Opinion of the Fourth District should be affirmed. The Fourth District was correct in holding that the practice of the Broward Sheriff's Office of reconstituting powder cocaine was illegal. This resulted in a violation of the Respondent's due process rights, requiring a reversal of the trial court under State v. Glosson, 462 So.2d 1082 (Fla. 1985).

ISSUE

The Fourth District Court of Appeal was correct in holding that a due process violation occurred when the Broward Sheriff;s Office illegally manufactured crack cocaine.

ARGUMENT

The Respondent requests that the Fourth District be affirmed. The actions of the Broward Sheriff's Office were illegal. As stated by the Fourth District in Kelly v. State, 593 So.2d 1060 (4th DCA 1992):

> We have reconsidered the issue of the police manufacture or reconstitution of powdered cocaine into "crack" rocks, and we find that the practice is illegal. We hold that the use by the police of such reconstituted "crack" infringed on the appellant's right to due process of law. In other words, the police agencies cannot themselves do an illegal act, albeit their intended goal may be legal and desirable.
>
> Manufacture is defined in section 893.02(12)(a), Florida Statutes (1989) as:
>
> > The production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container . . .
>
> (Emphasis supplied.)
>
> Thus, it seems that the statute is sufficiently broad as to encompass the reconstitution of regular cocaine into "crack," or rock cocaine. Depositions of the police chemist supplied with the record in the instant case support our decision that the process of reconstitution constitutes manufacture under Chapter 893, Florida Statutes (1989).

In addition, the Fourth District cited numerous facts which indicated the very grave consequences of the

activity complained above:

> We find that the Sheriff of Broward County acted illegally in manufacturing "crack" for use in the reverse sting operation which led to the arrest of the appellant. Even more disturbing is the fact that some of the "crack," which is made in batches of 1200 or more rocks, escapes into the community where the reverse sting operations are conducted. The police simply cannot account for all of the rocks which are made for the purpose of the reverse stings.
>
> Such police conduct cannot be condoned and rises to the level of a violation of the constitutional principles of due process of law. State v. Glosson, 462 So.2d 1082 (Fla. 1985). Accordingly, we reverse the appellant's conviction and we instruct the trial court, on remand, to enter an order of discharge. Id. at 1062.

According to Glosson, supra, the issue of whether governmental misconduct constitutes a due process violation is an objective question of law. When the misconduct is sufficiently egregious, the dismissal of criminal charges is required. (See, also, United States v. Twigg, 585 F.2d 373 (3rd Cir. 1978). The correctness of the Fourth District's opinion that the conduct complained of herein was sufficient to warrant dismissal is self-evident.

The Petitioner also complains that the Respondent failed to raise the aforementioned issue at trial. Fundamental error may be considered for the first time on appeal. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). In particular,

when an error is so fundamental that it constitutes a denial of due process, it may be urged on appeal. D'Oleo-Valdez v. State, 531 So.2d 1347 (Fla. 1988); Ray v. State, 403 So.2d 956, 960 (Fla. 1981); Castor v. State, 365 So.2d 701 (Fla. 1978); State v. Smith, 240 So.2d 2807 (Fla. 1970).

Since the issue at hand clearly goes to the foundation of the case and the merits of the cause of action herein, said error is so fundamental that it was not error for the Fourth District to consider it on appeal for the first time.

CONCLUSION

Based on the preceding argument and authorities, this Court should affirm the opinion of the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Answer Brief was furnished by United States Mail to James J. Carney, Esquire, Assistant Attorney General, Attorney for Petitioner, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 30 day of December, 1992.

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KEVIN J. KULIK