IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JOHN FRANCIS ROBERTSON,

Respondent.

CASE NO. 80,731

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the prosection in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the Appellee in the Fourth District Court of Appeal. Respondent was the defendant and the appellant below.

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 of the Case and Facts.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

The Fourth District Court of Appeals (DCA) decision in Robertson v. State, 605 So.2d 94 (Fla. 4th DCA 1992) was a correct application of existing law, and therefore must be affirmed. The action of the Broward Sheriff's Office (BSO) crime lab in manufacturing crack cocaine for sale by undercover policeman constitutes outrageous conduct which violates Respondent's right to due process of law. While the police may utilize strategms and subterfuge to ferret out criminal activity, the police are not allowed to engineer a crime from start to finish in order to secure a criminal conviction. Here, that is precisely what happened: the police manufactured cocaine, which otherwise would not have existed in the criminal marketplace, which was offered for sale to Respondent. Thus, Robertson must be affirmed.

ARGUMENT

POINT ON APPEAL

ROBERTSON V. STATE, 605 So.2d 94 (Fla. 4th DCA 1992) MUST BE AFFIRMED.

Petitioner asks this Court to disapprove the Fourth District Court of Appeals (DCA) decision in Robertson v. State, 605 So.2d 94 (Fla. 4th DCA 1992) vacating Respondent's conviction and sentence for purchasing cocaine within 1000 feet of a school. Robertson had relied on Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992) review denied 599 So.2d 1280 (Fla. 1992), which held that "reverse sting" operations using cocaine manufactured by law enforcement officers violated the due process clauses of the Florida and the United States Constitutions, Kelly, supra at 1061. In this case, the answer to the question certified by the Fourth DCA - does the source of illegal drugs used by law enforcement personnel to conduct reverse stings constitutionally shield those who become illicitly involved in such drugs from criminal liability? - requires reference to principles broadly identified, in Florida and elsewhere, with the "due process" defense.

Both Florida and federal law recognizes that where the conduct of law enforcement officers is sufficiently outrageous, due process bars prosecuting authorities from invoking the judicial process to seek a conviction, see generally United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) and Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); State v. Glossen, 462 So.2d 1082 (Fla. 1985); see also United States v. Bogart, 783 F.2d 1428, 1434-1438 (9th Cir. 1986); State v. Cayward,

552 So.2d 971, 973 (Fla. 2d DCA 1989) review dismissed, 562 So.2d 347 (Fla. 1990). This Court's formulation of the due process defense in Glossen is broader than the applicable federal standard, Brown v. State, 484 So.2d 1324, 1326 (Fla. 3d DCA 1986) review denied 492 So.2d 1330 (Fla. 1986), citing Glossen, supra. at 1085. Glossen specifically held:

> Based upon the express provision of Article I, Section 9 of the Florida Constitution . . . governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges.

Id. at 1085.

In Glossen, this Court cited with approval the discussion of the "outrageous conduct" due process defense found in State v. Hohensee, 650 S.W. 2d 268 (Mo. App. 1982). The Hohensee court summarized the rule announced in Hampton and Russell as governmental "overinvolvement" in crime, if outrageous, violates due process, 650 S.W. 2d at 271 (citations omitted). In determining what constitutes "outrageous conduct", Hohensee quoted with approval a nonexclusive list of factors delineating by the New York Court of Appeals in People v. Isaacson, 378 N.E. 2d 70 (N.Y. 1978):

> (a) Whether the police manufactured the crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity;
>
> (b) Whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice;
>
> (c) Whether the defendant's reluctance to

> commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or persistent solicitation in the face of unwillingness;
>
> (d) Whether the record reveals simply a desire to obtain a conviction, with no showing that the police motive is to prevent further crime or protect the populace.

Hohensee, supra. at 273, n.7. Isaacson was likewise cited with approval in Glossen, id. at 1085. Thus, "where the governmental agents engineer and direct the criminal enterprise from start to finish, or where the police action [is,] in effect, the generation by police of new crimes for merely the sake of pressing criminal charges against the defendant," the conduct is outrageous, Bogart, supra. at 1436 (citations omitted). The rationale for the "outrageous conduct" defense was spelled out in Bogart:

> Criminal sanction is not justified when the state manufactures crime that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter his conduct; absent the government's involvement, no crime would have been committed. Similarly, a defendant need not be incarcerated to protect society if he or she is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate persons who, absent governmental misconduct, would not engage in crime. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, and becomes an end in itself. . . under such circumstances, the criminal justice system infringes upon personal liberty and violates due process.

Id. at 1436 (citations omitted).

Judged by these standards, the conduct in Respondent's case

was truly "outrageous". Manufacturing crack cocaine is, literally speaking, "manufacturing crime" which would otherwise not have occurred. That is, but for the undercover law enforcement officer's possession of cocaine created in the BSO crime lab, Respondent could not have purchased cocaine in this case, even if Respondent wanted to do so. Moreover, by definition police "reverse sting" activities are simply motivated to obtain a conviction, rather than to prevent ongoing criminal activity. Accordingly, under the legal criteria identified as important to a reasoned legal analysis, the police activity here was "outrageous," and thus subject to dismissal.

Other Courts dealing with the due process defense have dealt with factual patterns similar to Respondent's case. Thus, in Commonwealth v. Matthews, 500 A.2d 853 (P.A. Sup. 1985), the police provided two men with money to purchase materials for, and building space to manufacture, methamphetamine. While the defendants in Matthews were conducting their activities, they ran into problems effectuating necessary chemical processes. In response to their request for help, two police chemists provided technical advise to those defendants on four separate occasions, 500 A.2d at 856-857. The Pennsylvania Appellate Court in Matthews found those police activities "shocking" and "outrageous," since:

> The police not only set the stage for their criminal act but also were principal players thereon without which [those] defendants could not have acted.

Id. at 857. Similarly here, the police used "technical expertise" to manufacture crack cocaine. The only material difference between

Matthews and this case is that in Matthews the police merely provided advise to those defendants to overcome technical problems in the criminal enterprise resulting in the ultimately successful manufacture of contraband. In this case, on the other hand, BSO employees manufactured the contraband themselves. Practically speaking, the result is the same - drugs manufactured due to direct efforts by law enforcement officers. Moreover, the facts in this case are more "outrageous" because, for the first time in any reported case, the police took the direct step of producing contraband themselves.

On the other hand, in United States v. Twiggs, 588 F.2d 373 (3d Cir. 1978), the DEA provided money and supplies to two defendants to again manufacture methamphetamines. Twiggs is analogous factually to Respondent's case because there a DEA informant, that is, a police agent, actually performed all material manufacturing activities in the lab where the contraband was produced, 588 F.2d at 376. The Third Circuit in Twiggs found a violation of due process in prosecuting those defendants because "[t]here is certainly a limit in allowing governmental involvement in crime. . ," id. at 385, n.10 (citations omitted).

Finally, in United States v. Valdonvinois-Valdonvinois, 558 F.Supp. 551 (N.D. Cal. 1984) reversed on other grounds 743 F.2d 1436 (9th Cir. 1984) certiorari denied 469 U.S. 1114, 105 S.Ct. 799, 83 L.Ed. 2d 791 (1985), the INS set up a telephone line whose existence was disseminated by INS agents to Mexican nationals. In a recorded message found on the phone line, the Mexicans were

advised that they could enter the United States without immigration papers. Those people who responded to the message were later arrested upon their attempt to enter this country. Also arrested was one defendant who transported the Mexicans. The District Court in Valdonvinois-Valdonvinois found a due process violation, based on outrageous conduct as to both the Mexicans and the transporter, 558 F.2d at 556, 558. The Ninth Circuit of Appeals later reversed this determination as to the transporter, who had no contact with the INS or their telephone message, 743 F.2d at 1447-1448. That Court expressed no view as to the INS conduct vis-a-vis the Mexicans, id. at 1448. Similarly here, by any standard of "outrageousness " the BSO's action, in conjunction with the undercover law enforcement officer's use of the crime lab product, violated Respondent's due process right to be free from governmental activity "manufacturing crime from start to finish". That is exactly what happened here; under Glossen and other cited authority:

> Constitutionally unacceptable are those hopefully few cases where the crime is fabricated entirely by the police to secure the defendant's conviction rather than to protect the public from the defendant's continuing criminal behavior.

United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986) (emphasis in original). Hence, the correct answer to the question certified in Robertson is "yes". Accordingly, Robertson must be affirmed.

Against the foregoing formidable authorities and rationales, Petitioner's claims in support of disapproving Robertson are

insubstantial. For example, Petitioner's citations to United States v. Beverly, 723 F.2d 11 (3d Cir. 1983) and United States v. Tobias, 662 F.2d 381 (5th Cir., Unit B, 1982) certiorari denied 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982) as persuasive authority for upholding the actions of the Broward Sheriff's office in manufacturing crack cocaine are inappropriate. Neither Beverly, nor Tobias involve law enforcement officers or agents themselves manufacturing contraband, without which no criminal charges were possible, Beverly, supra. at 12; Tobias, supra. at 386-387. Nor is Petitioner's reliance on Beverly's admonition that Courts should "only. . . curb the most intolerable government conduct," id. at 12 (citation omitted) helpful, since this statement merely begs the question: what steps does the due process clauses of the United States and Florida Constitutions allow the police to take in order to secure the cocaine they used in this case? Under the due process defense proffered by Respondent and recognized by State v. Glossen, 462 So.2d 1082 (Fla. 1985), the ends sought by law enforcement do not always justify the means they utilize to achieve those ends. "Anything goes" is not the law of this country, or this State.

Petitioner's "waiver" argument is no more appealing. Petitioner claims, for the first time in this Court, that Respondent did not move to dismiss the charge against him in the trial court on the basis of "outrageous government conduct," Petitioner's Brief on The Merits, p.7. However, this claim is without merit for two reasons: (1) Petitioner is precluded from

raising an argument in this Court not made to the Fourth DCA, see Sapp v. State, 411 So.2d 363, 364 (Fla. 4th DCA 1982), and (2) Defense counsel's objection was specific enough to apprise the trial court of its basis, see Williams v. State, 414 So.2d 509, 512 (Fla. 1982) (no "magic words" are necessary to properly object):

> [Defense counsel]: I would also move to dismiss the charges even at this late hour based on due process and fundamental fairness. It's fundamentally unfair for law enforcement to legally [sic] manufacture cocaine, then sell it on the street. It is illegal for them to violate the laws and then arrest somebody else for violating the same laws that they violate.

(R 120). See Tobias, supra. at 386 (Due process defense challenges governmental conduct violating "that fundamental fairness shocking to the universal sense of justice") (citation omitted). Clearly, defense counsel's words were sufficiently specific under Tobias to alert the trial court to the legal basis for counsel's motion to dismiss, Williams, supra. at 512. As a result, this issue is indeed cognizable for adjudication in this Court.

Petitioner next seeks to "turn the light" away from its own agent's misconduct by arguing that the police action has nothing to do with the elements of the crime Respondent was charged with. Petitioner cannot escape the glares so easily, however; under Glossen and other cited case law:

> . . . governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires dismissal of criminal charges.

462 So.2d at 1088 (emphasis supplied); accord United States v.

Ivey, 949 F.2d 759, 769 (5th Cir. 1991); United States v. Cuervello, 949 F.2d 559, 565 (2d Cir. 1991); United States v. Simtob, 901 F.2d 799 (9th Cir. 1990); United States v. Porter, 709 F.Supp. 770 (E.D. Mich. 1985) affirmed without opinion 895 F.2d 1415 (6th Cir. 1990). Thus, the focus of Respondent's due process defense remains on the State and its agents: some police actions to "ferret out" crime are considered so outrageous that dismissal of resulting criminal charges is mandated no matter what the defendant did or did not do. The whole point of this defense is to discourage police from manufacturing crime themselves by creating conditions under which crime is allowed to flourish, instead of simply detecting and stopping ongoing crime, United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir. 1986).

Nor is this result changed by State v. Bass, 451 So.2d 986 (Fla. 2d DCA 1984). In Bass, a defense motion to dismiss a marijuana conspiracy charge was granted by the trial court. One of the grounds cited by that trial court was the lack of specific statutory authority for police to engage in "reverse-sting" operations, 451 So.2d at 988. The Second District Court of Appeal reversed, finding that Section 893.09 (5) (1981) relieved police from criminal liability for using drugs in the enforcement of drug laws, and that even providing the contraband would not render the police action unlawful, id. However, Bass does not involve the ultimate question of whether the police may create the contraband themselves, rather than simply using contraband already in existence, but in police possession by confiscation. That question

has been decided by Kelly v. State, 593 So.2d 1060, 1061 (Fla. 4th DCA 1992) review denied 599 So.2d 1280 (Fla. 1992), a result this Court ought to approve, for the reasons discussed herein.

Finally, while Petitioner's reliance on People v. Wesley, 274 Cal. Rptr 326, 224 Cal. App. 3d 1130 (Cal. App. 1990) review denied (January 17, 1991) is understandable, it is ultimately unavailing. In Wesley, a criminal defendant arrested for purchasing cocaine from an undercover police officer moved to dismiss the charges against him, contending that "reverse-sting" operations violated both California statutory law and due process concerns, 274 Cal. Rptr. at 328. The appellate court in Wesley questioned whether the "outrageous government conduct" due process defense was recognized at all in California, id. at 332, but held that "reverse-stings" per se would not constitute "outrageous governmental conduct," id at 331. That, of course, is not the issue in Respondent's case; since the defense in Wesley did not allege that those law enforcement officers manufactured the cocaine they used for ensnaring that defendant, Wesley is not relevant to disposition of this appeal. Additionally, the California court in Wesley improperly transposed principles relevant to an entrapment defense, i.e., a defendant's predisposition to commit the charged crime, with that defendant's due process claim, Wesley, supra. at 333; see also People v. West, 274 Cal. Rptr. 569, 575, 224 Cal. App. 3d 1337 (Cal. App. 1990) review denied (January 17, 1991), a patently improper juxtaposition under Glossen and federal law governing the due process defense. Thus, Wesley does not suggest

disapproval of Robertson.

The distinction between Respondent's case and cases where police merely supply to prospective offenders contraband already in existence, e.g. State v. Bass, 451 So.2d 986 (Fla. 2d DCA 1984) is that in the latter instance, police are not literally "manufacturing" crime; i.e., the possibility of possessing contraband. Instead, police actions using confiscated cocaine involve merely providing to the criminal that which already exists due to the criminal acts of others. In Respondent's case, BSO "manufactured" crack cocaine out of powder cocaine, see Kelly, supra. at 1061:

> Florida Statutes, Section 893.02 (12) (a) defines "manufacture" as, among other things, the "conversion" of material into contraband.

In such circumstances, law enforcement is creating the possibility for committing crime that did not exist previously. Viewing the issue as phrased in the Fourth DCA's certified question in Robertson, what logical distinction exists between police using confiscated powder cocaine to manufacture (i.e., convert to) crack cocaine, and police purchasing the necessary constituent chemicals for manufacturing crack from a chemical supply store, then brewing their own batch of crack? Respondent can see no material difference between these two factual scenarios. However, the courts in United States v. Twiggs, 588 F.2d 373 (3d Cir. 1978) and Commonwealth v. Matthews, 500 A.2d 853 (P.A. Sup. 1985) found the latter circumstance fully made out due process violations based on "outrageous government conduct". Based on the applicable logic of

the Twiggs and Matthews decisions, as well as the rationale of Glossen, Respondent suggests the same result is mandated in the first scenario, which constitutes the facts of his case. Accordingly, Respondent asks this Court to answer the certified question "yes," then approve Robertson and Kelly as correct applications of State v. Glossen, 462 So.2d 1082 (Fla. 1985).

CONCLUSION

The certified question propounded by the Fourth District Court of Appeal in Robertson v. State, 605 So.2d 94 (Fla. 4th DCA 1992) must be answered in the affirmative, and the decision in Robertson must be approved, based on State v. Glossen, 462 So.2d 1082 (Fla. 1985).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to DOUGLAS J. GLAID, Assistant Attorney General, 4000 Hollywood Boulevard,, Suite 505-S, Hollywood, Florida 33021, this 16th day of December, 1992.

Of Counsel