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FILED
SID J. WHITE
FEB 1 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

GREG WALLACE,

Respondent.

Case No. 80,911

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

AUTHORITIES CITED

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

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

This 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 state-wide importance. Neither is this 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 kelly v. State and 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 Untied Stated Constitution.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING 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 ILLEGALLY MANUFACTURED AND USED. STATE v. WALLACE MUST THEREFORE BE AFFIRMED.

The issue presented to the district court of appeal was whether the trial court erred in dismissing an information for purchase of cocaine within 1,000 feet of a school where Mr. Wallace 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 affirmed on the authority of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), and Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992), rev. pending, Case No. 79,507. On rehearing the court 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?

Clearly the question certified is far broader than the very narrow, fact-oriented question originally presented to the district court in Kelly.

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 "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 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 shot, and requests certification. But as the Lake court noted,

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[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.

[2] The office of the clerk of the Supreme Court reports that 88 questions were certified in 1988, 102 in 1989, 151 in 1990, 189 in 1991 and 156 in 1992.

> ... (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 will show, 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, 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, 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.[3] Respondent therefore urges this Court to exercise its discretion by declining to accept jurisdiction here.

If however 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 noted, 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 Count 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 Kelly was charged with purchasing was manufactured by the police, namely the Broward County Sheriff's Office Laboratory chemist Randy Hilliard. Hilliard was making crack cocaine pursuant to orders from Sheriff Nick Navarro. Some 1,200 rocks were manufactured in the first 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. Once the chemical compounding occurs, the cocaine and soda combination sink to the bottom of the mixture.

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[3] All of the cases resolved by reference to the Kelly decision arose from the same operation which lasted approximately 18 months but has since been discontinued.

At that point, Hilliard 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 feet of Southside School. The rocks were distributed by the police within 1,000 feet of another school. Some of the rocks were not recovered and were unaccounted for. 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. Kelly v. State, 593 So. 2d at 1062. Thus it was the combination of the specific facts of the operation under consideration that resulted in the court's ultimate finding of outrageous conduct in Kelly. Id.

The state in its brief claims that "reconstituting powder cocaine into crack cocaine" is not the illegal manufacture of contraband. Petitioner's Brief at 4. The following Florida Statutes (1991) 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) 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 of anyone else to manufacture crack cocaine.

Petitioner attempts to skirt this problem by somehow claiming (though not explaining) that "reconstituting" powder cocaine into crack is really not manufacturing. Petitioner's brief at 4. If petitioner were correct, then it is impossible to manufacture crack since it all starts out as powdered cocaine; the only persons guilty of manufacturing would be the labs (mostly offshore) which convert the leaves to the 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 (1991):

> "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 converting powder cocaine into its lethal cousin crack by compounding it with another sub-

stance, here soda.[4] Just as clearly, the legislature did not authorize police agencies to set-up a manufacturing operation. What is next, growing poppies and manufacturing heroin? 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. 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

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[4] The chemist himself referred to the process as "converting," not "reconstituting." For as Judge Letts noted in his original dissenting opinion in Kelly, the process here involves more than merely adding water to coffee grounds. 593 So.2d at 1062. See definition of "reconstituting" -- "to restore to a former condition by adding water." Webster's Ninth New Collegiate Dictionary.

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

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.

The due process defense has also been recognized in other federal cases which condemn outrageous conduct by the government, of which Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), is a classic case. Though Rochin was violating the law by his possession of drugs, the combination of the police breaking into his bedroom, choking him, and then pumping his stomach was more than the society will allow. See also Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (due process violated when officers forcibly removed drug packets from defendant's rectum). Nor were the courts impressed in United States v. Valdovinos-Valdovinos, 558 F. Supp. 51 (N.D. Cal. 1984), reversed on other grounds, 743 F.2d 1436 (9th Cir. 1984) cert. denied 469 U.S. 1114, 105 S. Ct. 799, 83 L. Ed. 2d 791 (1985), with a government scheme whereby the INS set up a telephone line, whose existence was then disseminated by INS agents to Mexican nationals, which carried a recorded message advising callers that they could enter the United States without immigration papers. The people who responded were then arrested as they attempted to enter the country. See also United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986) (remanded for determination of the facts).

In support of its claim that the actions of the sheriff's office were proper, Petitioner cites United States v. Beverly, 723

F.2d 11 (3d Cir. 1983), characterizing it as deciding a "similar" due process claim. Beverly however did not involve law enforcement officers themselves manufacturing contraband, necessary to the charge here, but more importantly, the agents there stopped short of actually committing the crime. Respondent suggests that had the agents allowed the defendants to set fire to the building so they could charge them with arson, the court's determination that the conduct did not reach a "demonstrable level of outrageousness" would have been different. Here, not only did the sheriff's office manufacture and distribute the crack (setting fire to the building,) they failed to have the fire department standing by (i.e. they lost part of the drugs they made.)

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. But there is more. The police then distributed the crack cocaine on the streets, some of which was never recovered and presumably is causing the harm which the drug laws were intended to prevent. And this is not a drug of little consequence. Indeed, the concurring opinion in Kelly correctly notes that crack is "worlds apart" from its powdered cousin. 593 So. 2d at 1063. 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 Constitution'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

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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.

actions in the creation of new crime was held to be a violation of due process. In determining what constitutes "outrageous conduct", Hohensee quoted with approval a nonexclusive list of factors delineated 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 Glosson, id. at 1085. Reversal was required even though the defendant was predisposed to participate in the offense. Certainly the manufacture of crack cocaine is more egregious conduct than committing a burglary.

And yet another case with a similar due process violation is Commonwealth v. Matthews, 500 A.2d 853 (P.A. Sup. 1985), wherein 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 the necessary chemical processes. In response to their request for help, two police chemists provided

technical advice 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 advice 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. Like the first and second factors in Hohensee and Isaacson, here the police took an existing bad drug (powder cocaine) and by compounding and changing its form, made it into a cheap, highly addictive, and deadly one, greatly increasing the available supply at the same time. They did this despite prohibition by the legislature, and then they took mass quantities of this deadly drug into a school, a place the legislature has specifically targeted to be drug free. And while they may not have twisted arms to get buyers, (the third Isaacson factor,) their ready and constant presence with an

unlimited supply of crack held for addicts or recovering addicts, those least able to resist, an easy and tempting next fix.

And perhaps the district court in Kelly also saw something of the fourth factor as well: Kelly, as well as numerous other arrested defendants, had no prior criminal history. Had the goal been merely to identify drug-addicted people and get them into treatment, that could have been accomplished by selling soap chips in lieu of real crack, charging the defendants with attempt. Instead, by using real crack and taking it into school zones, the police virtually tied the hands of the courts to do anything but send those arrested to prison for a mandatory three year sentence.

Finally, and perhaps worst of all, the misconduct here is aggravated by the actual distribution of the crack cocaine without later being able to recover it from the streets or even account for the drugs checked out from the lab. See 593 So.2d at 1062. The possibility for police corruption in a scheme with so many rocks and so little inventory control can hardly be underestimated as well. If due process can be violated, it was violated by the police conduct in this case.

Though petitioner argues otherwise, dismissal was appropriate because that is the only real check on the government's conduct. Here the purpose of the remedy, just as with the exclusionary rule, is to deter police misconduct. Nor is dismissal a novel remedy. Rather, it is one this Court and the other courts cited have recognized as appropriate not only in Glosson but in objective entrapment cases such as Cruz v. State, 465 So. 2d 516 (Fla. 1985), and State v. Hunter, 586 So. 2d 319 (Fla. 1991), as well. While

ignoring this Court's precedents for dismissal, petitioner cites People v. Wesley, 224 Cal.App. 1130, 274 Cal. Rptr. 326 (Cal. App. 2d Dist. 1990). But in that case the California legislature had specifically authorized the police officers' actions which in total the court found did not meet the test for outrageousness. The combined factors involved in the instant case are however an entirely different matter.

Lastly petitioner 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 existing 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 result of the outrageous manufacturing endangers the audience -- i.e. society. Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 483, 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 violated the due process clause of the Florida Constitution as the district court correctly held. Art. I, sec. 9, Florida Constitution. Additionally, it violated the United States Constitution. Fifth and Fourteenth Amendments, United States Constitution. The district court should therefore be affirmed.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court affirm the decision 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 28 day of January, 1993.

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