IN THE

SUPREME COURT OF FLORIDA

SHELDON GATHERS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,027

RESPONDENT'S BRIEF ON THE MERITS

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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 this 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

This Court should decline to exercise its jurisdiction in the instant case. The issue presented 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. Nor does this case present a new or developing area in the law. Therefore, this Court should decline to answer the questions 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 it should affirm the decision of the district court. Respondent did not waive his right to raise this issue for the first time on appeal as the error complained of was fundamental. The police conduct of manufacturing and distributing crack cocaine, as conducted in Kelly v. State and the case at bar, 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. The only proper remedy for such a violation is to affirm the decision of the district court vacating respondent's conviction and forever discharge respondent from future criminal prosecution arising from this incident.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THE RESPONDENT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE BROWARD COUNTY SHERIFF'S OFFICE USE OF CRACK COCAINE ROCKS WHICH IT ILLEGALLY MANUFACTURED AND USED. GATHERS v. STATE MUST, THEREFORE, BE AFFIRMED.

On appeal to the fourth district court of appeal respondent argued his right to due process of law was violated when he was arrested, charged and convicted of purchase of cocaine within 1,000 feet of a school because the crack cocaine which he purchased was manufactured by the Broward County Sheriff's Office.[1] Relying upon its previous holdings in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1991) and Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992) the court reversed respondent's conviction and remanded his case to the trial court with instructions he be discharged. Gathers v. State, 17 F.L.W. 2684, 2685 (Fla. 4th DCA 1992). In so ruling the court certified the following question to be of great public importance:

> DOES A POLICE AGENCY'S CONVERSION OF POWDER COCAINE INTO "CRACK" OR ROCK COCAINE FOR SUBSEQUENT USE IN A REVERSE STING SALE CONSTITUTE ILLEGAL MANUFACTURE OF THE DRUG UNDER CHAPTER 893, FLORIDA STATUTES (1989), AND IF SO, DOES THIS AMOUNT TO A DEPRIVATION OF DUE PROCESS AS WOULD SHIELD FROM PROSECUTION A DEFENDANT ACCUSED OF PURCHASING THIS CRACK COCAINE?

Id. at 2685.

Initially, respondent contends 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 questions herein presented. In Lake v. Lake, 103 So. 2d 639 (Fla.

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[1] This argument was raised for the first time on appeal.

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[2], the theme behind the decision is applicable sub judice:

> They (district courts) are and were meant to be courts of final, appellate jurisdiction. [citations omitted]. 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.

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."[3] The ever-growing number of certified questions could be viewed as a trend away from the district courts view of themselves as courts of final, appellate jurisdiction.

The certified questions presented here do not present such unresolved and important legal issues that they require more than

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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.

[3] 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.

the decision of the district court. Stein v. Durby, 134 So. 2d 232 (Fla. 1961). The district court in Kelly v. State and, therefore, in the case at bar was not required to initially construe Florida's due process clause[4], rather, it 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 issues and resolves them differently, there is no showing that the issues here are of such statewide importance that only this Court should resolve them. Respondent, therefore, urges this Court to exercise its discretion by declining to accept jurisdiction.

Should, however, this Court choose to exercise its discretion by accepting jurisdiction respondent urges this court to affirm the decision of the district court. On a procedural note, petitioner has requested this Court reverse the decision of the district court and reinstate respondent's conviction because he failed to raise his due process argument at the trial level, thereby barring him from raising it on appeal. In Grissett v. State the fourth district, citing this Court's opinion in Ray v. State, 403 So. 2d 956 (Fla. 1981), held that allowing an individual to be convicted where a Kelly due process violation existed amounted to fundamental error which could be raised for the first time on appeal. Grissett, 594 So. 2d at 322. Discussing fundamental error the Ray Court stated:

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[4] Construing Florida's due process clause had been accomplished by this Court in State v. Glosson, 462 So. 2d 1082 (Fla. 1985).

> 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. (citations omitted).

Ray, 403 So. 2d at 960;

See also D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988) (denial of due process may be raised for first time on appeal). Having previously found, in Kelly, that the police activity in which respondent was ensnared amounted to a due process violation the court was correct in allowing respondent to raise the issue for the first time on appeal. Petitioner's reliance upon Smith v. State, 598 So. 2d 1063 (Fla. 1992) is misplaced. There, this Court held that to preserve an issue for appellate review a defendant must make a timely objection only in those situations where an objection is required. In the case at bar respondent's right to due process of law was violated. As previously noted such a violation amounts to fundamental error which may be raised on appeal for the first time. Therefore, this case involves a situation where an objection was not required.

Addressing the merits of the case the decision of the district court to reverse respondent's conviction was based upon its prior holding in Kelly v. State. In Kelly the Broward County Sheriff's Office conducted a reverse sting operation in which officers posed as sellers of crack cocaine. The operation was carried out within 1,000 feet of a school so that any purchaser arrested would, upon conviction, be sentenced to a mandatory minimum sentence of three years in prison. The crack cocaine purchased by Kelly was manufactured by Randy Hilliard, a laboratory chemist with the

Broward County Sheriff's Office. Hilliard made the crack cocaine pursuant to orders from Sheriff Nick Navarro. Multiple batches of crack were produced. The first batch contained approximately 1,200 rocks, an amount exceeding 28 grams. To make crack Hilliard took powdered cocaine, which had been ordered destroyed, and boiled it together with baking soda until the elements combined. Once the chemical compounding occurred the cocaine and soda combination sank to the bottom of the water. The water was then poured off and the cocaine-soda mixture was poured into pans where it cooled until crystallized. After the mixture cooled it was cut into pieces and packaged. The laboratory where the rocks were manufactured was within 1,000 feet of a school. The rocks were distributed within 1,000 feet of another school. Some of the rocks were not recovered and remained unaccounted for after the operation. 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 these rocks were actually lost, the chemist agreed that the sale of some of the rocks did not result in arrests, and those rocks were distributed for illegal use. Were it not for the action of the sheriff's office, those rocks would not have been in circulation because the cocaine would have been destroyed. Kelly, 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. at 1062.

Florida law prohibits the sale, purchase, manufacture, or delivery of a controlled substance within 1,000 feet of a school except as authorized by statute. Fla. Stat., § 893.13(1)(e). The

exceptions authorized by statute are set forth in section 893.13(4). Subsection (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. Subsection (c) excepts the delivery of controlled substances by law enforcement in the course of a criminal investigation. The statutory scheme excepts possession and delivery of controlled substances under certain circumstances but does not allow the police or anyone else to manufacture crack cocaine.

In its brief the state attempts to skirt this problem by contending (though not explaining) that "reconstituting powder cocaine to crack cocaine" is not the illegal manufacture of contraband. Petitioner's Brief at 7. If petitioner is correct then the manufacture of crack is impossible since it starts out as powdered cocaine. Following petitioner's analysis the only people guilty of manufacturing would be those who convert the leaves into powder. Surely that is not what the legislature intended when it gave the word manufacture the following definition:

> "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....

Fla. Stat., § 893.02 (12) (a).

Clearly the legislature has prohibited converting powder cocaine

into its lethal cousin crack by compounding it with another substance, here baking soda. Just as clearly, the legislature did not authorize police agencies to set up a manufacturing operation.

In the case at bar the illegal manufacture of the crack cocaine and its manner of distribution amounted to outrageous police conduct. The due process clause of both the Federal and Florida Constitutions protect our citizens from outrageous conduct of law enforcement agencies. At least two federal courts have reversed convictions on the basis of outrageous police conduct involving the manufacture of contraband. In Greene v. United States, 454 F. 2d 783 (9th Cir. 1971), the defendants were charged with the illegal manufacture of alcohol. There an undercover agent had supplied sugar at wholesale prices, an operator, and a still. The court overturned the conviction because the police misconduct in manufacturing the illegal alcohol had violated due process. Also to consider is United States v. Twigg, 588 F. 2d 373 (3rd Cir. 1978), wherein the defendants were charged with the illegal manufacture of methamphetamine hydrochloride -- i.e. "speed." In Twigg a Drug Enforcement Agency informant, as part of a plea bargain, involved the defendants in setting up a speed lab. The government supplied about twenty percent of the glassware and phenyl-2-propanone (an indispensable ingredient). In addition, the informant purchased a majority of the materials needed and the government provided a production sight. Twigg's conviction was overturned due to the 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 one. 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 society would 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), rev'd 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 (3rd 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, and more importantly, the agents stopped short of actually committing a 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, the Sheriff's Office manufactured and distributed the crack (setting fire to the building).

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 which created a very dangerous and highly addictive drug, crack. The police are entrusted with the responsibility of preventing the creation of the very drug they manufactured. In addition, the police distributed the crack cocaine on the street.

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,[5] 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).

In State v. Hohensee, 650 S.W. 2d 268 (Mo. Cr. App. 1982), cited

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[5] In Twigg, 588 F. 2d 373, the Third Circuit noted that in other federal cases indicating some police involvement in manufacturing, such as United States v. Leja, 563 F. 2d 244 (6th Cir. 1977), reversals were not warranted. The Twigg court distinguished the other cases on grounds that it was the defendants who concocted the manufacturing scheme not the government.

with approval in Glosson, the police sponsored and operated a burglary. The defendant's conviction was reversed because the actions of the police in the creation of new crime was held to be a violation of due process. To help it determine what constitutes "outrageous conduct", Hohensee adopted the following 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, 650 S.W. 2d at 273, n. 7.

Isaacson was also cited with approval in Glosson. There reversal was required even though the defendant was predisposed to participate in the offense. Certainly the manufacture of crack cocaine is more egregious conduct that the commission of a burglary.

Another case with a similar due process violation is Commonwealth v. Matthews, 500 A. 2d 853 (Pa. Sup. 1985), wherein the police provided two men with money to purchase materials 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 on four occasions. Id. 500 A. 2d at 856-857. The Superior Court of Pennsylvania found the police actions "shocking" and "outrageous," because "[t]he 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 successful manufacture of contraband. In this case, the police 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 this deadly drug to within 1,000 feet of a school, an area the legislature has specifically targeted to be drug free,

where they sold it. 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 cocaine 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 asserted defendants, had no prior criminal history.[6] 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 and 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 minimum three year sentence.

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. Dismissal is not a novel remedy. It is one this court has recognized as appropriate. See Cruz v. State, 465 So. 2d 516 (Fla. 1985); State v. Hunter, 586 So. 2d 319 (Fla. 1991). While ignoring this Court's precedent for dismissal, petitioner cites People v. Wesley, 224 Cal. App. 1130, 274 Cal. Rptr. 326 (Cal. App. 2d Dist. 1990). There, however, the California legislature had specifically authorized the police officers'

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[6] The guideline scoresheet prepared in respondent's case does not evidence prior criminal history (R255).

actions which in total the court found did not meet the test for outrageousness. The combined factors involved in the instant case are an entirely different matter.

Petitioner also argues that any illegality on the part of the Sheriff's Office should not insulate respondent from criminal liability based upon the holding in 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 existing drugs at all times remained in the possession of police officers or agents. Not so in the case at bar 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 case.

In conclusion, petitioner suggests that should this Court affirm the dismissal of the charge against respondent it should

either remand the case, pursuant to Section 924.34 Florida Statutes, to the trial court and allow him to be adjudicated and sentenced for attempting, soliciting or conspiring to purchase or possess cocaine or it should allow the state to file an amended information charging the highest crime with which respondent may be charged. Petitioner's suggestion is without merit.

Section 924.34 Florida Statutes states:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgement and direct the trial court to enter judgement for the lesser degree of the offense or for the lesser included offense.

Respondent's conviction was not reversed because the appellate court determined that the evidence did not prove the offense for which he was found guilty. His conviction was reversed, regardless of his guilt, because the outrageous conduct of the police precluded a conviction. Due process, not insufficient evidence, led to the reversal of respondent's conviction. Section 924.34, by its very wording, does not apply to the situation at bar. See Douglas v. State, 10 So. 2d 731, 733 (Fla. 1942) (in discussing predecessor to section 924.34 Court stated in order for trial court to impose judgement for lesser offense appellate court must first determine evidence does not establish the offense for which defendant was found guilty). In addition, neither attempt, solicitation nor conspiracy are lesser degrees of the offense with which respondent was charged, see Brown v. State, 206 So. 2d 377, 381 (Fla. 1968) (attempts distinguishable from crimes divided into

degrees), or necessarily lesser included offenses. See Gould v. State, 577 So. 2d 1302, 1305 (Fla. 1991) (section 924.34 applicable to necessarily lesser included offenses only); Bruns v. State, 408 So. 2d 228, 229 (Fla. 4th DCA 1991) (attempts are a category separate from necessarily included offenses), approved, 429 So. 2d 307 (Fla. 1983); Schedule of Lesser Included Offenses, Sale, purchase, etc., near public school - 893.13(1)(e) (no necessarily lesser included offense listed).

Petitioner's reliance on Metcalf v. State, 18 F.L.W. 381 (Fla. 4th DCA 1993) is unfounded. Unlike the case at bar, where respondent was initially charged and found guilty of a crime to which the Kelly due process argument applied and then had to rely on his appellate rights to have his conviction vacated, there the appellant was initially charged with an offense to which the Kelly due process argument did not apply. In Metcalf there was no violation of appellant's right to due process, here there was.

Finally petitioner contends this Court should affirm the dismissal without prejudice so that it may file a new information charging a different crime. Petitioner could have chosen from the outset to charge respondent with a crime which, at least at the district court level, did not run afoul of Kelly. See Id. That was not the path chosen. Instead petitioner was charged with a crime, forced to trial on a crime, found guilty of a crime, incarcerated for a crime and discharged after appeal for a crime which due process of law prohibits. To allow petitioner a second bit of the apple at this stage would amount to acknowledging the existence of the due process clause while at the same time rendering it

meaningless. The remedy for a violation of a criminal defendant's due process rights is dismissal. Glosson, 462 So. 2d at 1084.

In addition, the present situation is analogous to that where retrial is prohibited, after the declaration of a mistrial, on double jeopardy grounds due to prosecutorial misconduct. Although here it was not the intentional conduct of the prosecutor which caused respondent to avoid the verdict of the jury, it was the intentional and outrageous misconduct of a fellow state agent, the Sheriff's Office. Jeopardy attached when respondent's jury was sworn. Misconduct of the highest degree has required respondent to invoke his appellate rights. To allow the state to file new charges against him, based upon the same conduct, in this situation would be unconscionable. Furthermore, should this court affirm the decision of the district court it will be saying that this case should have been withdrawn from consideration by the jury. In that situation a dismissal is akin to an acquittal and further prosecution is barred. Cf. State v. Bolick, 512 So. 2d 960, 961 (Fla. 2d DCA 1987).

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to affirm the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier this 19 day of FEBRUARY, 1993.

Attorney for