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IN THE SUPREME COURT OF FLORIDA

BARBARA METCALF,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,612

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
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15th Judicial Circuit

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court. She will be referred to by name and as Petitioner in this brief.

The decision being reviewed, a conformed copy of which is attached hereto as Appendix A, will be referred to as the decision of the lower tribunal or of the lower court. It will be cited to by its official citation in the West Reporter system, Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993).

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

Petitioner, Barbara Metcalf, took a timely appeal to the District Court of Appeal for the Fourth District from an order placing her on probation (R-22-24,25). She raised the issue of the trial court's denial of her motion to dismiss the charge against her on ground of denial of due process of law (R-13-16).

The district court of appeal, citing to the decision in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), described the issue as whether a person, who could not be convicted of possession or purchase of cocaine under Kelly can nevertheless be convicted of solicitation to deliver cocaine. Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), at 549. The lower tribunal noted in the decision below that there was a completed delivery by the sheriff's officers of lab manufactured cocaine to Barbara Metcalf, and that but for the decision to charge her with solicitation to deliver rather than with possession or purchase, the prosecution would be barred under the due process clause of Florida's Constitution.

The record shows that this offense occurred prior to the decision on rehearing in Kelly, and that Metcalf was initially arrested for purchase but that this was filed by the prosecuting attorney as solicitation as had been done with other cases that had to be refiled after the decision in Kelly in order to avoid dismissal of the prosecutions (R-5).

The court below held that the crime of solicitation can be completed even if the Sheriff's Office has no cocaine, and thus the court found a lack of nexus between the elements of the charge of solicitation and the manufacture of the crack cocaine by the

Sheriff's laboratory. Metcalf v. State, supra at 550. Harking to the law of attempt, the lower tribunal held it irrelevant that the "transaction ultimately resulted in an unlawful transfer of a drug" and that "outrageous police misconduct constituting a due process violation ensnaring one defendant" does not entitle another defendant to discharge as well. Metcalf v. State, supra at 549.

Petitioner filed a motion for rehearing which was denied. (Copies attached hereto as Appendix B and Appendix C).

This Court subsequently decided in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), that the manufacture of crack cocaine by law enforcement officials for use in reverse sting operations is governmental misconduct in violation of the due process clause of the Florida Constitution. Id., 18 Fla. L. Weekly at S371. The Court reversed the conviction in that case for purchasing that manufactured crack cocaine offered in that sting operation.

This Court accepted jurisdiction of this case in an Order issued July 9, 1993. This brief is filed in accordance with that order accepting jurisdiction.

STATEMENT OF THE FACTS

The decision and record below sets forth the essential facts that Metcalf was arrested and charged with purchase of cocaine but was formally charged with solicitation due to the district court decision in Kelly v. State, supra, holding the due process clause to preclude conviction of persons for purchase of cocaine illegally manufactured by the Sheriff's Office. The tribunal below refused

to extend that decision to the same persons arrested for purchase but whose cases were being filed or prosecuted after the Kelly decision and where an alternative crime was charged instead of the precise charge of purchase.

Based on the distinction between the elements of solicitation and the elements of purchase, the lower tribunal affirmed Metcalf's case despite the identity of governmental conduct that existed to induce the conduct out of which the charge was made.

SUMMARY OF ARGUMENT

Petitioner Metcalf was initially arrested for purchase of crack cocaine manufactured and sold by the Broward Sheriff's Office. Due to the decision of the Fourth District Court of Appeal in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), the local prosecuting authority charged solicitation of cocaine instead of purchase.

The court below affirmed in Metcalf's case, thus denying relief since the charge made against her was different although the police misconduct was the same. This Court has determined in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), that such conduct cannot be countenanced and that the courts should refuse "to invoke the judicial process" where the methods utilized constitute governmental misconduct which violates a sense of justice and fairness. The Court has considered the practice at issue, and has resolved the constitutional concerns which will not be repeated in full herein.

The conclusion that Petitioner seeks is the Court's application of the decision in State v. Williams, to the case below. The Court should quash the decision being reviewed as inconsistent with the holding in Williams, supra, at S372, that due process is a general principle of law that prohibits the government from obtaining convictions "brought about by methods that offend 'a sense of justice.'" Quoting to Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 2d 183 (1952).

This case is controlled by those principles and the specific holding of Williams because here also the outrageous practice brought about the prosecution of Petitioner. As moved for below, that prosecution should be dismissed.

ARGUMENT

WHETHER IT IS ALSO A VIOLATION OF DUE PROCESS OF LAW FOR THE STATE TO PROSECUTE FOR SOLICITATION TO PURCHASE GOVERNMENTALLY MANUFACTURED AND DISTRIBUTED CRACK COCAINE THAT IS USED BY SHERIFF'S OFFICERS IN A REVERSE STING OPERATION?

The Court should rely upon its due process analysis in State v. Glosson, 462 So. 2d 1082 (Fla. 1985), where at 1085, the Court stated 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."

The Court in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), at S372, adopted the view that the due process clause provides a "defense to overturn criminal convictions as a

check against outrageous police conduct." The Court in Williams found persuasive authority that included a situation where a predisposed defendant's burglary conviction had been overturned due to police having both sponsored and operated a burglary for him to participate in as a look-out. State v. Hohensee, 650 S.W. 2d 268 (Mo. Ct. App. 1982).

The lower tribunal affirmed Metcalf's case by relying upon her pre-disposition but ignoring the governmental misconduct. The lower tribunal's decision is sharply at odds with this Court's rationale as well as with its specific determination of the controlling facts sub judice. Simply because the prosecuting attorney may choose a similar offense to charge, instead of charging purchase of the illegally police manufactured and distributed crack cocaine, the decision below would permit the practice of using that cocaine in reverse sting operations to continue unabated. The decision below noted that the offense of solicitation does not include as an essential element the actual transfer of the crack cocaine by the police. Yet, as the court below found, there was indeed a transfer of that police manufactured crack cocaine. As shown by the exhibit attached hereto as Appendix D, the police continue to use the crack cocaine in reverse sting operations long months after the decision in Kelly became final. The record in Buraty v. State, 4th DCA Case No. 92-2205 (Appendix D) shows that six months after the Fourth District had condemned the practice in Kelly, the officers were still doing the same thing. Only by enforcing the holding in Williams, that "the courts refuse to invoke the judicial process" where such outrageous

conduct occurs will the practice be stopped.

The decision of the Fourth District Court of Appeal in Kelly only caused the State Attorney and circuit courts to change the denomination of the charges and convictions. The practice must end. This Court has held that it cannot be countenanced consistently with principles embodied in the due process clause of the Constitution. The people of Florida expect these principles to govern the basic practices of their government.

Crack cocaine will still be "lost" into the community unless all charges arising out of the direct use of that cocaine in reverse sting operations are dismissed. The central point of the due process clause in these situations is to deter the outrageous conduct of the governmental authorities. The focus is less on the conduct of persons ensnared by the practice than it is on removing the judicial process from becoming a partner to the practice.

The legal and factual distinctions drawn by the district court in the present case are illusory distinctions that were inappropriately applied to this case. First, the Fourth District's factual distinction ignored the fact found in the opinion below that there was an actual transfer in this case of the manufactured crack cocaine. The crack cocaine would not need to become evidence against Metcalf at any trial proceedings. There would be less need for inventory control of it than if it had been an actual element of the offense.

The legal distinction drawn by the district court was that the decision in State v. Hunter, 586 So. 2d 319 (Fla. 1991), did not extend the due process protection to persons removed from the

misconduct. The Fourth District, sub judice, said the following about this, Metcalf v. State, supra, at 549-550:

> It is irrelevant that the transaction ultimately resulted in an unlawful transfer of a drug. We note by analogy that the Supreme Court has recognized that outrageous police misconduct constituting a due process violation ensnaring one defendant, does not entitle a codefendant, who had no direct contact with the police informant involved, to a discharge as well. State v. Hunter, 586 So. 2d 319 (Fla. 1991).

First, Metcalf had direct contact with the outrageous police misconduct. Second, she was not once removed as the defendant was in Hunter from the informants's entrapment of another. Third, the misconduct is not irrelevant to the transaction. If the police below had not manufactured the crack cocaine they would not have been positioned near the school delivering it to persons and attracting persons to come up to view it, offer to buy it, and to attract all the evil that is associated with such transactions.

This Court's opinion in State v. Williams, supra, is designed to apply a standard long in existence that governmental conduct must be consistent with the public good. The Court has examined this practice of the Broward Sheriff's Office and has determined that it is "incredible that law enforcement's manufacture of an inherently dangerous controlled substance, like crack cocaine, can ever be for the public safety." Id., 18 Fla. L. Weekly at S373. This Court has resolved the issue of whether the judicial process can be made party to such convictions when it held, id., at S373:

> Moreover, the protection of due process to obtain a conviction where the facts of the case show that the methods used by law enforcement officials cannot be countenanced with

> a sense of justice and fairness. The illegal manufacture of crack cocaine by law enforcement officials violates this Court's sense of justice and fairness.

The conclusion of this case is determined by the following from the Court's conclusion in State v. Williams, supra, at S373:

> Thus, the only appropriate remedy to deter this outrageous law enforcement conduct is to bar the defendant's prosecution.

Likewise, the Court is urged not to retreat from its determination to apply the due process of the law clause of our Constitution to bar such outrageous conduct from continuing. The use of another, substantially similar, charge to avoid the limitations of Williams would defeat justice and fairness as mandated by the Constitution as interpreted and applied by the Court.

CONCLUSION

WHEREFORE, the Court is respectfully urged to quash the decision below and remand with directions that the cause be reversed consistent with the decision in State v. Williams.

Respectfully Submitted,

RICHARD L. JORANDBY
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15th Judicial Circuit

LOUIS G. CARRES
Assistant Public Defender
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Florida Bar No. 114460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOSEPH TRINGALI, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 29th day of JULY, 1993.

LOUIS G. CARRES
Assistant Public Defender

A P P E N D I X

- A -

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1993

BARBARA METCALF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-0885.

L.T. CASE NO. 91-24354 CF.

Opinion filed January 27, 1993

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; Robert Fogan, Judge.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

STONE, J.

The issue is whether a defendant, who otherwise would be discharged if prosecuted for the purchase of cocaine, pursuant to Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992), may nevertheless be convicted of solicitation to deliver cocaine. The deputy arrested the Defendant in a "reverse sting" in which the only drug involved was crack cocaine unlawfully manufactured by the sheriff's lab, a circumstance which this Court has determined is a due process violation. Kelly. The trial court denied Appellant's motion to dismiss. We affirm.

Section 777.04(2), Florida Statutes, provides:

> Whoever solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation.

The Appellant contends that the State may not prosecute her on the related charge, when she could not be charged with the purchase, within 1000 feet of a school, which ultimately occurred following the "solicitation." She asserts that to hold otherwise is to effectively condone unlawfully "ensnaring" the purchaser where the sheriff's intent is to complete a delivery proscribed by Kelly. The Appellant does not dispute that, but for the source of the drug, the solicitation charge is otherwise valid.

In Kelly, the purchase of the crack was an essential element of the charged offense. Here, however, the State need not prove a completed purchase, nor even that the undercover "seller" possessed drugs, in order to convict the potential buyer of solicitation. E.g., State v. Johnson, 561 So. 2d 1321 (Fla. 4th DCA 1990); State v. Milbro, 586 So. 2d 1303 (Fla. 2d DCA 1991). The crime of solicitation is completed prior to any purchase or delivery. All of the elements of a solicitation are present when the defendant entices or encourages the other party to commit the crime. Johnson; Milbro. In Johnson, this Court stated:

> The crime of solicitation is completed when the actor with intent to do so has enticed or encouraged another to commit a crime; the crime need not be completed.

***

> The crime of solicitation focuses on the culpability of the solicitor. It is irrelevant that the other cannot or will not follow through.

It is irrelevant that the transaction ultimately resulted in an unlawful transfer of a drug. We note by analogy that the supreme court has recognized that outrageous police misconduct constituting a due process violation ensnaring one defendant, does not entitle a codefendant, who had no direct contact with the police informant involved, to a discharge as well. State v. Hunter, 586 So. 2d 319 (Fla. 1991). It has also been determined with respect to charges involving attempts, that where a substance is not itself an essential element of the crime, it does not matter whether the substance used is introduced, or is even real. See Tibbetts v. State, 583 So. 2d 809 (Fla. 4th DCA 1991). See also Louissaint v. State, 576 So. 2d 316 (Fla. 5th DCA 1990); State v. Cohen, 409 So. 2d 64 (Fla. 1st DCA 1982).

We conclude that the limited relationship between the drugs in the deputy's possession and the elements of this offense is not sufficient to violate Appellant's due process rights.

WARNER, J., concurs.
FARMER, J., concurs specially with opinion.

FARMER, J., specially concurring.

I concur in the essential rationale and result of Judge Stone's opinion. I stress that I do so only because the defendant has not, as observed by Judge Stone, made any challenge to the application of the solicitation statute, section 777.04(2), Florida Statutes (1991), to the facts of this case. Her sole contention on appeal is that the crack cocaine sought to be sold by the sheriff in this undercover sting operation was manufactured by the sheriff in his own lab, a practice which we condemned in Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 1280 (Fla. 1992) as a violation of constitutional due process.

A P P E N D I X

- B -

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

BARBARA METCALF, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO.: 92-0885

MOTION FOR REHEARING, REHEARING EN BANC AND REQUEST FOR CERTIFICATION OF ISSUE TO SUPREME COURT AS PASSING ON A QUESTION OF GREAT PUBLIC IMPORTANCE

1. The solicitation of cocaine by appellant was, as the Court expressly noted in the first sentence of the Opinion, a mere precedent incident to the purchase of cocaine manufactured in the laboratory of the Broward Sheriff's Department. The manufacture was unlawful, and all cases of purchase in "reverse stings" conducted by the use of this cocaine have been held to constitute a violation of due process of law. Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA), rev. denied, 599 So. 2d 1280 (Fla. 1992).

2. The merger of the solicitation with the purchase was overlooked by the Court, and requires reconsideration of the affirmance of the conviction. This issue can be raised initially on direct appeal. In Troedel v. State, 462 So. 2d 392 (Fla. 1984), the Court held convictions for the dual offenses, when there was only one commission of a statutory offense to be a fundamental error correctable on direct appeal without having been raised in either the trial or appellate courts. The Court said, id., at 399:

> There was no evidence of more than one such unlawful entry. The court should have merged counts four and five not only for sentencing purposes but also for purposes of rendering a single judgment of conviction.

In Sloan v. State, 323 So. 2d 278 (Fla. 2nd DCA 1975), a defendant had been convicted of robbery of two counts of aggravated assault, one on the same victim as the robbery and constituting the force or violence upon which the robbery charge was based. The court held that: "This assault being the force involved in the robbery merged into and became part of the offense of robbery." Id., at 278.

Mills v. State, 476 So. 2d 172 (Fla. 1985), concerned conviction of aggravated battery as a lesser included offense of first-degree murder. While holding that "it is possible to commit each of these crimes without committing the other, and each contains elements which the other does not" that, nevertheless, "we do not believe it proper to convict a person for aggravated battery and simultaneously for homicide as a result of one shotgun blast. In this limited context the felonious conduct merged into one criminal act." Id., at 177.

3. Since the crack cocaine was used to conduct this reverse sting, and since the sting was not conducted without the manufactured cocaine it is inconsistent for the Court to affirm conviction for an offense that by law merged into the purchase, an offense barred by the facts from prosecution due to the state's egregious unlawful conduct under Kelly.

4. The fact that appellant entered a plea of no contest to

specifically reserve the right of appeal from the denial of the motion to dismiss facilitated the preservation of the issue but deprived the Court on appeal of any facts to show the obvious connection between the Sheriff's Department's use of the cocaine and the solicitation. The Court should recognize that the solicitation was inextricably bound up with the sting operation. None of the participants were involved independently of the proffered "manufactured" crack cocaine that was prominently a part of the operation.

5. The Court's decision approving conviction of appellant of an offense necessarily part of this operation is arguably inconsistent with its decision in Kelly. Appellant submits that en banc consideration is needed to maintain consistency of decisions on this point of law within the District.

Appellant's solicitation was inseparably connected due to the reality that persons induced to purchase had to solicit the very same cocaine that was made known to her to be available by those Sheriff's officers.

WHEREFORE, it is respectfully prayed that the panel will reconsider its decision, or alternatively that the full Court will consider the issue en banc, or that the Court will certify the question whether a crime that merged with the completed crime of purchase can be separated for independent conviction when the greater offense is barred by due process.

Respectfully submitted,

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Attorney for Barbara Metcalf

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, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 11th day of FEBRUARY, 1993.

Of Counsel.

A P P E N D I X

- C -

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

BARBARA METCALF

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 92-00885

L.T. CASE NO 91-24354 CF
BROWARD

March 16, 1993

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed February 11, 1993 for rehearing, rehearing en banc and request for certification of issue to supreme court as passing on a question of great public importance is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Public Defender 15
Attorney General-W. Palm Beach

/AR

RECEIVED
MAR 17 1993
PUBLIC DEFENDER'S OFFICE
APPELLATE DIVISION
15th JUDICIAL CIRCUIT

A P P E N D I X

- D -

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
WEST PALM BEACH, FLORIDA

ROBERT BURATY,

Appellant.

-vs-

STATE OF FLORIDA,

Appellee.

: CASE NO. 92-11334

: APPEAL NO. 92-2205

RECORD-ON-APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA - CRIMINAL DIVISION

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RICHARD L. JORANDBY P.D. (15th),
Attorney for Appellant.

JOAN FOWLER,
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