



TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	ii
PRELIMINARY STATEMENT . . . . .	1
STATEMENT OF THE CASE AND FACTS . . . . .	2
SUMMARY OF ARGUMENT . . . . .	3
ARGUMENT . . . . .	4
THE AFFIRMANCE OF PETITIONER'S CONVICTION FOR PURCHASE OF POLICE-MANUFACTURED COCAINE, ON THE SOLE BASIS THAT THE CHARGE WAS REDUCED TO SOLICITATION, CONSTRUES THE DUE PROCESS CLAUSE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS IN A WAY WHICH REQUIRES THIS COURT'S REVIEW. . . . .	4
CONCLUSION . . . . .	7
CERTIFICATE OF SERVICE . . . . .	7

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Buraty v. State</u> , Fourth District No. 92-2205 . . . . .	5
<u>Gordon v. State</u> , Fourth District No. 92-00972 . . . . .	5
<u>Jollie v. State</u> , 405 So. 2d 418 (Fla. 1981) . . . . .	4, 5
<u>Kelly v. State</u> , 593 So. 2d 1060 (Fla. 4th DCA 1992) . . . . .	2, 4, 5
<u>Lacy v. State</u> , Fourth District No. 92-00953 . . . . .	5
<u>Metcalf v. State</u> , 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993) . . . . .	2, 4, 5
<u>Styles v. State</u> , Fourth District No. 92-1608 . . . . .	6
<u>Williams v. State</u> , 593 So. 2d 1064 (Fla. 4th DCA 1992) . . . . .	5

OTHER AUTHORITIES

FLORIDA CONSTITUTION

Article V, section 3(b)(3) . . . . .	4
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PRELIMINARY STATEMENT

Petitioner 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. Respondent was the prosecution and the appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with solicitation to deliver cocaine within 1,000 feet of a school. He moved to dismiss, alleging that he had been arrested for purchase of cocaine manufactured by the Broward Sheriff's Office, and alleged a violation of Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), which held such manufacture to be a denial of due process.

The Fourth District affirmed on authority of Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993) (copy in Appendix to this brief). Rehearing and certification were denied by order filed March 11, 1993 (copy in Appendix).

Notice to Invoke Discretionary Jurisdiction was filed April 6, 1993 (copy in Appendix).

### SUMMARY OF ARGUMENT

This case involves an interpretation of the Due Process clauses of the Florida and United States Constitutions which this Court must review. This Court already has before it the question of whether due process prohibits a conviction for purchase of crack cocaine manufactured by the police. The instant case questions whether the state may avoid the unconstitutionality by charging the lesser offense of solicitation rather than purchase. If the answer to the second question is yes, then this Court's answer to the first question will be meaningless. This Court must therefore review the instant case. Jurisdiction is provided by the "citation PCA" rule.

## ARGUMENT

THE AFFIRMANCE OF PETITIONER'S CONVICTION FOR PURCHASE OF POLICE-MANUFACTURED COCAINE, ON THE SOLE BASIS THAT THE CHARGE WAS REDUCED TO SOLICITATION, CONSTRUES THE DUE PROCESS CLAUSE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS IN A WAY WHICH REQUIRES THIS COURT'S REVIEW.

The decision of the Fourth District in the instant case, a "citation PCA," implicates the Due Process clauses of the Florida and United States Constitutions, and a related point of constitutional law presently pending before this Court, in a way which requires this Court's review. This Court has jurisdiction because the Fourth District has construed these provisions of the state and federal constitutions. Article V, § 3(b)(3), Fla. Const.

Because the decision is a citation PCA, jurisdiction is established by reference to the cited case. Jollie v. State, 405 So. 2d 418 (Fla. 1981). The cited case is Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993) (copy in Appendix).<sup>1</sup> Metcalf held that a conviction for solicitation of an undercover police officer to deliver cocaine manufactured by the police was not a due process violation. Metcalf drew a distinction from Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992) (copy in Appendix), which had held it to be a due process violation to prosecute for the purchase of police-manufactured cocaine.

The Kelly issue is now pending before this Court. However, Petitioner acknowledges that the instant case presents this Court with a jurisdictional twist because Kelly itself is not the case in which the issue is pending. This Court denied review of Kelly

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<sup>1</sup> A petition for review is being filed in Metcalf itself.

at 599 So. 2d 1280 (Fla. 1992). However, the issue developed in Kelly is now pending before this Court on review of Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992) (copy in Appendix) (Supreme Court Case No. 79,507). The Williams opinion itself, in fact, contains no discussion; the opinion is a one-sentence citation PCA citing Kelly, with a later order certifying a question. This Court will only be able to decide Williams with reference to Kelly. The mere happenstance that the decision will be styled "Williams" rather than "Kelly" should not be allowed to bar jurisdiction over the instant case. This would be a hypertechnical application of the citation PCA rule, which otherwise establishes this Court's jurisdiction over the instant case. In Jollie this Court recognized that the "randomness of the District Court's processing" should not control a party's right to Supreme Court review. 405 So. 2d at 421.

A hypertechnical application of the rule would prevent this Court from reviewing an important issue intertwined with Kelly which is affecting numerous cases, but which would then not reach this Court. Metcalf, if not reviewed, will, before the fact, gut any decision by this Court in Williams. This is because Metcalf authorizes the state to dodge Kelly by simply filing the lesser charge of solicitation any time an arrest is made for purchase of police-manufactured cocaine. The Fourth District has already affirmed numerous convictions on the basis of this meaningless distinction.<sup>2</sup> If this Court does not decide the legality of this

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<sup>2</sup> Besides the instant case, other Fourth District cases which have affirmed on authority of Metcalf are Gordon v. State, Fourth District No. 92-00972; Lacy v. State, Fourth District No. 92-00953; Buraty v. State, Fourth District No. 92-2205; and Styles v. State,



artifice, then it might as well not bother to decide Williams itself. This Court must accept jurisdiction in the instant case in order to fully consider the propriety of the police selling crack cocaine which they themselves have produced.

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Fourth District No. 92-1608. Rehearing and certification have been denied in Metcalf, Gordon, and Lacy, as well as in the instant case. (Copies of opinions and orders denying rehearing in Appendix to this brief).

CONCLUSION

Petitioner requests this Court to accept jurisdiction to review the merits of this case.

Respectfully Submitted,

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida



ALLEN J. DeWEESE  
Assistant Public Defender  
Attorney for Charles Baker  
Criminal Justice Building/6th Floor  
421 3rd Street  
West Palm Beach, Florida 33401  
(407) 355-7600  
Florida Bar No. 237000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melvina Racey Flaherty, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 17th day of April, 1993.



ALLEN J. DeWEESE  
Assistant Public Defender