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IN THE SUPREME COURT OF FLORIDA

CHARLES BAKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 81,614

PETITIONER'S BRIEF ON THE MERITS

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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.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with solicitation to deliver cocaine within 1,000 feet of a school (R 10). 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 (R 19-20). Attached to the written motion was a police report stating that Petitioner was sold cocaine "pre-analyzed, manufactured, packaged, and supplied by the BSO Crime Laboratory" (R 21-22). The motion was denied and Petitioner pled no contest to the charge, reserving the right to appeal denial of the motion (R 3-8, 12, 23).

On appeal, the Fourth District affirmed on authority of Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993) (now pending on the merits before this Court under case no. 81,612). Rehearing and certification were denied March 11, 1993.

Notice to invoke discretionary jurisdiction was filed in this Court April 6, 1993. This Court accepted jurisdiction by order of August 18, 1993.

SUMMARY OF ARGUMENT

This Court has already held that a conviction for purchase of police-manufactured crack cocaine is a due process violation. Here, Petitioner was arrested for such a purchase, but the Fourth District upheld his conviction because it was for solicitation rather than purchase. The distinction is meaningless: this court's ruling was intended to deter the police manufacture, and the remedy declared is to bar prosecution. Charging the lesser crime of solicitation is a subterfuge which this Court cannot permit to gut its holding.

ARGUMENT

A CONVICTION FOR SOLICITATION TO PURCHASE POLICE-MANUFACTURED COCAINE IS A VIOLATION OF DUE PROCESS OF LAW.

This case is controlled by this Court's recent decision in State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993). In Williams, this Court held that the manufacture of crack cocaine by law enforcement officials for use in reverse-sting operations constitutes governmental misconduct which violates the Due Process Clause of the Florida Constitution. The reverse-sting operation was conducted within 1,000 feet of a school, and Williams was convicted for purchasing the crack cocaine.

Petitioner here, like Williams, was arrested for purchase within 1,000 feet of a school of crack cocaine manufactured by the Broward Sheriff's Office. The only difference between the instant case and Williams is that Petitioner was convicted of the lesser offense of solicitation rather than purchase. However, Williams makes it clear that the arrest and conviction constitute a due process violation where the cocaine is manufactured by law enforcement, no matter what the degree of the resulting conviction. This issue is presently before this Court in the lead case of Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993) (Supreme Court Case No. 81,612), on authority of which the Fourth District affirmed in the instant case, and in Buraty v. State, 616 So. 2d 550 (Fla. 4th DCA 1993) (Supreme Court Case No. 81,864). This Court must rule on all of these cases that a conviction resulting from a reverse-sting using police-manufactured cocaine is a due process violation. If this Court does not so rule, then the

Williams decision will become meaningless because law enforcement could then continue to manufacture crack cocaine and obtain convictions merely by filing the lesser charge of solicitation.

Williams makes it clear that the due process violation is the police activity of manufacturing the crack cocaine, without regard to the charge filed or the conviction ultimately obtained. This Court found that the conduct so outrageous as to violate due process was the police manufacture. This Court concluded that "the only appropriate remedy to deter this outrageous law enforcement conduct is to bar the defendant's prosecution" (emphasis added). Prosecution is barred ab initio, without regard for the actual charge or ultimate conviction.

The distinction drawn by the Fourth District in Metcalf, supra, is therefore a false one. The court noted that the crime of solicitation is complete upon the solicitation, and that no delivery need be made; solicitation convictions have been upheld when there was no drug at all to be delivered or the drug in question was not real. The Fourth District reasoned, therefore, 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." 614 So. 2d at 550. The court analogized this situation to that in State v. Hunter, 586 So. 2d 319 (Fla. 1991), in which this Court held that when an entrapped middle man induced a third person to become involved in a crime, due process did not prevent that third person from being convicted.

In Hunter, however, this Court was not concerned primarily with the deterrence of police misconduct, but rather with the creation of crime by police action. This Court first held that

there was not the danger of perjury in court by an informant which had caused the court in State v. Glosson, 462 So. 2d 1082 (Fla. 1985) to find a due process violation for informant fees contingent upon convictions. Hunter, 586 So. 2d 321. This Court then held that Hunter's co-defendant, Conklin, had been entrapped because there was no ongoing crime when the informant solicited Conklin to traffic in cocaine. However, this Court held Hunter could be convicted because he was not enticed into the deal by the informant but rather by Conklin. Thus, when Hunter entered the picture, there was an ongoing crime between the informant and Conklin; due process was not offended by his conviction.

Here, entrapment is not even at issue. The police directly sold Petitioner a piece of illegally manufactured crack (R 21-22). Petitioner's solicitation was to the officer with the crack; that particular solicitation would not have occurred but for the desire of the police to use that illegally manufactured crack to make a case against buyers in a reverse-sting operation. Unlike in Hunter, there was no intervening conduct by a non-state agent which removed the taint of the original due process violation. There was no intervening conduct at all to remove the taint of the misconduct: the police used the manufactured crack to entice Petitioner to make a purchase and then charged him just as they intended to do.

This Court's decision in Williams was intended to deter police misconduct and to protect the integrity of the courts and the law. To permit the police to do what they did in Williams but simply charge the offense as solicitation instead of purchase does nothing to deter the misconduct and nothing to protect the integrity of the

courts and the law. To permit the charge of solicitation to stand would make a mockery of Williams' holding that the courts will not condone this police misconduct. The same dangers to the community are present regardless of the particulars of the charge: crack cocaine will escape into the community and the police will have violated the law which they purport to uphold. This Court must not gut Williams by permitting convictions which are the intended result of the police illegality. This Court must here reaffirm Williams and stand firm in its declaration that police manufacture of crack cocaine will not be tolerated.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court reverse 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 Melvina Racey Flaherty, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 9th day of September, 1993.

ALLEN J. DeWEESE
Assistant Public Defender