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FILED
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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

N/C

OWEN LACY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

81615

Case No. 92-0953

PETITIONER'S BRIEF ON JURISDICTION

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

ANTHONY CALVELLO
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421 3rd Street
West Palm Beach, Florida 33401
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Attorney for Owen Carey

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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-Appellant was originally arrested for purchase of cocaine. Petitioner-Appellant was subsequently charged with solicitation to deliver cocaine. He moved to dismiss, alleging that he had been arrested for purchase of cocaine manufactured by the Broward County Sheriff's Office, and alleged a due process violation citing 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, in the instant case, affirmed Petitioner-Appellant's conviction, Lacy v. State, 18 Fla. L. Weekly D520 (Fla. 4th DCA Feb. 17, 1993) on the 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 18, 1993 (copy in Appendix).

Notice to Invoke Discretionary Jurisdiction was filed April 8, 1993 (copy in Appendix).

SUMMARY OF ARGUMENT

This case involves an interpretation of the Due Process clauses of both the United States and Florida 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 to purchase cocaine rather than purchase of cocaine. 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 CLAUSED 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).[1] 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

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[1] A petition for review is being filed in Metcalf itself.

with a jurisdictional twist because Kelly itself is not the case in which the issue is pending. This Court denied review of Kelly 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.[2] If this Court does not decide the legality of this 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. The due process clauses of the State and Federal Constitutions protect our citizens from "outrageous or shocking" conduct of law enforcement agent by barring the State from invoking the judicial process to obtain a conviction. Clearly an individual facing solicitation to deliver police manufactured drugs is just as entitled to protection from the outrageous and shocking conduct of law enforcement agents as an individual facing the more serious charge of purchase of cocaine.

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[2] Besides the instant case, other Fourth District cases which have affirmed on authority of Metcalf are Gordon v. State, Fourth District No. 92-00972; Baker v. State, Fourth District No. 92-00946; Buraty v. State, Fourth District No. 92-2205; and Styles v. State, Fourth District No. 92-1608. Rehearing and certification have been denied in Metcalf, Gordon, and Baker, as well as in the instant case. (Copies of opinions and orders in Appendix).

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

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Owen Lacy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Dawn S. Wynn, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 6th day of April, 1993.

Attorney for Owen Lacy

IN THE SUPREME COURT OF FLORIDA

OWEN LACEY, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	Case No. 92-0953

APPENDIX

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

OWEN LACY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-0953.

L.T. CASE NO. 92-2523 CF.

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

Opinion filed February 17, 1993

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

Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Dawn S. Wynn, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed on the authority of Metcalf v. State, 18 Fla. L. Weekly D381 (Fla. 4th DCA Jan. 27, 1993).

GLICKSTEIN, C.J., STONE, J., and OWEN, WILLIAM C., JR., Senior Judge, concur.

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

OWEN LACY

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 92-00953

L.T. CASE NO 92-2523 CF
BROWARD

March 18, 1993

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed March 3, 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; further,

ORDERED that appellant's motion filed March 3, 1993 to stay proceedings is hereby denied.

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

MARILYN BEUTTENMULLER
CLERK.

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

/AR

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

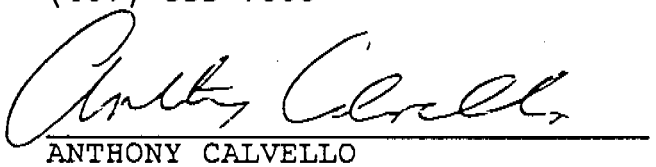
OWEN LACY, Appellant/Petitioner v. STATE OF FLORIDA, Appellee/Respondent.	CASE NO. 92-953

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is hereby given that OWEN LACY, Appellant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court dated February 17, 1993, and Motion for Rehearingand request for certification of issues denied by this Honorable Court on March 18, 1993. This decision was rendered on March 18, 1993. The decision expressly construes a provision of the State or federal constitution.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600



ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Dawn S. Wynn, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Bvld., West Palm Beach, Florida 33401-2299 this 8th day of April, 1993.

Attorney for Owen Lacy

remedies remains available on a case by case basis. *E.g. Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987). In this case such compensation claims by Appellees remain pending in the trial court, to be resolved on the evidence presented as to the individual parcels. *See Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA), *rev. denied*, 570 So. 2d 1304 (Fla. 1990).

I would therefore reverse. I do concur in the certified question.

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[1]§ 163.3161, et seq., Fla. Stat. (1991).

* * *

Criminal law—Defendant can be convicted of solicitation to deliver cocaine although arrest arose out of reverse sting operation in which the only drug involved was crack cocaine unlawfully manufactured by sheriff's lab—Crime of solicitation is completed prior to any purchase or delivery—Fact that transaction ultimately resulted in an unlawful transfer of drug manufactured by law enforcement agency is irrelevant to solicitation conviction

BARBARA METCALF, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 92-0885. L.T. Case No. 91-24354 CF. Opinion filed January 27, 1993. 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.

* * *

Torts—Negligence—Improper trading of securities—Action against securities dealer by beneficiary of express trust, alleging that dealer breached its duty of care in the selection, management and supervision of its employee who became trustee and improperly combined with the trustee to churn trust investment account to make unnecessary stock trades, thereby earning unwarranted commissions and dissipating trust assets—Trial court improperly granted summary judgment in favor of dealer on ground that beneficiary lacked standing to sue the dealer alone, after settlement with deceased trustee's estate

ST. MARTIN'S EPISCOPAL CHURCH, Appellant, v. PRUDENTIAL-BACHE SECURITIES, INC., Appellee. 4th District. Case No. 91-3540. L.T. Case No. CL 89-7031 AH. Opinion filed January 27, 1993. Appeal from the Circuit Court for Palm Beach County, W. Matthew Stevenson, Judge. Raymond J. Doumar, Jr. and John R. Gillespie, Jr. of Dykema Gossett, Fort Lauderdale, for appellant. John D. Boykin, of Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, West Palm Beach, for appellee.

(FARMER, J.) The beneficiary of an express trust (St. Martins) has sued a securities dealer (Prudential-Bache) for damages from negligence and improper trading of securities. The beneficiary had no direct dealings with the dealer. Rather, shortly after his appointment as trustee, the trustee had placed the trust's funds into an account with the dealer for investment purposes. It happens that at the time of his appointment the trustee was also a full time employee of the dealer and worked under its direction and control.

The beneficiary had also named the trustee as a party defendant in its lawsuit, but the trustee died during the pendency of this litigation. His personal representative was then substituted. Later, the beneficiary settled with the estate of the trustee, and the action was dismissed as against the estate of the trustee. The beneficiary now appeals a later order of the trial court granting a summary judgment[1] in favor of the dealer on the grounds that the beneficiary lacked standing to sue the dealer alone, after the settlement with the trustee's estate.[2]

We cannot agree that the trust beneficiary categorically lacked standing to sue the dealer under the particular facts alleged in this case. The beneficiary has carefully alleged that Prudential-Bache breached its duty of care in the selection, management and supervision of its employee who became the trustee. It has also alleged

cal status. *Carswell v. Broderick Construction*, 583 So.2d 803, 804 (Fla.1st DCA 1991).

[3] When a claimant has established a satisfactory physician-patient relationship with an authorized physician, employer/carrier may not deauthorize that physician without the claimant's prior agreement or without approval of a judge of compensation claims. Should the employer/carrier attempt to deauthorize without prior approval, good cause must be shown for such action. *Stuckey v. Eagle Pest Control Co., Inc.*, 531 So.2d 350, 351 (Fla.1st DCA 1988); *Cal Kovens Construction v. Lott*, 473 So.2d 249, 253 (Fla.1st DCA 1985).

[4] The issue presented by claimant in this case requires a determination by the judge of compensation claims regarding whether deauthorization is in the best interests of the claimant. Section 440.13(2)(a), Fla.Stat. (1989). Deauthorization without an order by the judge is proper only where overutilization is the basis for deauthorizing such care, and where a determination has been made in accordance with the overutilization review procedures outlined in the statute, and alternate medical care has been offered by the employer or carrier. Section 440.13(2)(a), Fla.Stat. (1989).

As justification for the unilateral deauthorization of the treating physician in this case, employer/carrier alleged overutilization, but failed to comply with the utilization review procedures prescribed by section 440.13(4)(d)1, Florida Statutes. In this regard, employer/carrier's reliance on *Carswell, Atlantic Foundation v. Gurlacz*, 582 So.2d 10 (Fla.1st DCA 1991), and *Lamounette v. Akins*, 547 So.2d 1001 (Fla. 1st DCA 1989), is misplaced. Those cases involved resolution of disputes concerning the amount of medical bills submitted by medical providers, and allegations of gouging. The statute contemplates that such disputes are to be decided by the division. This case concerns authorization for treatment, a matter reserved to the judge of compensation claims. *See Carswell*, 583 So.2d at 804.

Accordingly, the order granting employer/carrier's motion to dismiss is reversed, and the cause is remanded for further proceedings.

ERVIN and BARFIELD, JJ., concur.

Kevin KELLY, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 90–0465.

District Court of Appeal of Florida, Fourth District.

Jan. 3, 1992.

The Circuit Court, Broward County, Patti Englander Henning, J., denied defendant's motion to dismiss charge of purchasing cocaine within 1,000 feet of school. Defendant appealed. After appeal was initially denied, the District Court of Appeal, on rehearing en banc, voted to six-to-six tie, and cause then reverted to original panel. On rehearing, superseding its earlier opinion, the District Court of Appeal, Polen, J., held that use by police of reconstituted "crack" manufactured in sting operation infringed on defendant's right to due process of law.

Reversed and remanded.

Letts, J., filed specially concurring opinion.

Hersey, J., filed dissenting opinion.

1. Criminal Law ⇐36.5

Use of reverse sting operations does not, in and of itself, cause defendant's constitutional rights to be violated, even if reverse sting is specifically set up within 1,000 feet of school. U.S.C.A. Const. Amend. 14.

2. Constitutional Law ⇐257.5
Criminal Law ⇐36.5

Reconstitution by police of regular cocaine into "crack" or rock cocaine for use in sting operation infringed on defendant's right to due process; such manufacturing of "crack" for use in reverse sting operation did not fit into exclusions from statute prohibiting manufacture of controlled substances, which were specifically limited to possession and delivery of controlled substances by police officers. U.S.C.A. Const. Amends. 5, 14; F.S.1989, § 893.02(12)(a); West's F.S.A. §§ 893.01 et seq., 893.13, 893.13(5).

Richard L. Jorandby, Public Defender, and Cherry Grant, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

ON REHEARING

POLEN, Judge.

The court, sua sponte, voted to consider this appeal and appellant's motion for rehearing en banc. The court having then voted to a six-to-six tie, the cause reverts to the original panel. Fla.R.App.P. 9.331(a).

We grant rehearing and substitute the following for the opinion dated June 19, 1991:

The appellant was arrested for purchasing cocaine within 1000 feet of a school in violation of section 893.13(1)(e), Florida Statutes (1989). After being charged with the crime, the appellant moved to dismiss the charges against him. This appeal followed the trial court's denial of the appellant's motion to dismiss, and is based on two grounds. The first is that he was caught in a reverse sting operation and the second is that the police made, by reconstitution, crack cocaine for use in the operation. The appellant argued on both grounds that his constitutional right to due process of law was violated.

[1] We wish to clarify that in the prior opinion we did not mean to imply that the constitutional implications involved in the reconstitution or manufacture of cocaine into "crack" were decided in *State v. Burch*, 545 So.2d 279 (Fla. 4th DCA 1989), *aff'd*, *Burch v. State*, 558 So.2d 1 (Fla. 1990). We only wished to point out that the use of reverse sting operations does not, in and of itself, cause a defendant's constitutional rights to be violated, even if the reverse sting is specifically set up within one thousand feet of a school. *Burch*.

[2] We have reconsidered the issue of the police manufacture or reconstitution of powdered cocaine into "crack" rocks, and we find that the practice is illegal. We hold that the use by the police of such reconstituted "crack" infringed on the appellant's right to due process of law. In other words, the police agencies cannot themselves do an illegal act, albeit their intended goal may be legal and desirable.

Manufacture is defined in section 893.02(12)(a), Florida Statutes (1989), as:

> The production, preparation, propagation, compounding, cultivating, growing, *conversion*, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container....

(Emphasis supplied.)

Thus, it seems that the statute is sufficiently broad as to encompass the reconstitution of regular cocaine into "crack," or rock cocaine. Depositions of the police chemist supplied with the record in the instant case support our decision that the process of reconstitution constitutes manufacture under Chapter 893, Florida Statutes (1989).[1] Certainly, as Judge Letts wrote in the dissent from our original opinion, there is more to this reconstitution

1. The process involves the transformation of powdered cocaine, already in police custody, into rock form. The police chemist testified that the process involves the mixture of water and baking soda followed by a procedure which aids in the crystallization of the diluted mixture.

process than "simply adding hot water to instant coffee grounds."

Section 893.13 provides several exclusions from its application for police officers acting in the course of their duties, but these exclusions apply only and specifically to the possession and delivery of controlled substances. *See* § 893.13(5), Fla.Stat. (1989). If the legislature intended that police officers be permitted to manufacture "crack", or any controlled substance, before its possession or delivery, then such permission would presumably appear on the face of the statute. The legislature, if it intends to allow such practices, must expressly indicate their intent so that the courts can apply the law accordingly. At this time, however, there is no authority for the police to manufacture controlled substances by reconstitution or otherwise.

We find that the Sheriff of Broward County acted illegally in manufacturing "crack" for use in the reverse sting operation which led to the arrest of the appellant. Even more disturbing is the fact that some of the "crack," which is made in batches of 1200 or more rocks, escapes into the community where the reverse sting operations are conducted. The police simply cannot account for all of the rocks which are made for the purpose of the reverse stings.

Such police conduct cannot be condoned and rises to the level of a violation of the constitutional principles of due process of law. *State v. Glosson*, 462 So.2d 1082 (Fla. 1985). Accordingly, we reverse the appellant's conviction and we instruct the trial court, on remand, to enter an order of discharge.

HERSEY, J., dissents with opinion.

LETTS, J., specially concurs with opinion.

HERSEY, Judge, dissenting.

It is one thing to express righteous indignation over the fact that police illegally "manufacture" drugs in the first instance and then, in the second instance, allow some of those drugs to escape into the community. It is quite another thing, however, to suggest that one who buys such drugs acquires immunity from prosecution because his constitutional right to due process has been violated by that activity. Because I disagree with this illogical transference for several reasons, I respectfully dissent from the majority opinion.

The legislature has drawn an imaginary circle with a radius of 1000 feet around each of our schools. Drug dealers who penetrate that protective mantle are subjected to severe penalties. The public policy prompting the creation of that circle is that school children should not be subjected to either the temptations or the potential for violence associated with drug neighborhoods. The real tragedy here, then, is not that the police "manufacture" drugs, but that the police conduct stings and reverse stings near schools. If the police conduct at issue in this case violates the due process rights of anyone, it is the students, and their parents as parents, as citizens, and as taxpayers. This violation of the public's rights is hardly vindicated by immunizing a person who, by purchasing or selling drugs however manufactured, actually contributes to the violation in a very real way with potentially devastating consequences.

Another aspect of the problem is that the process which we condemn is simply the conversion of cocaine powder to cocaine rocks. We should note that the police have not thereby increased the total quantity of drugs in the marketplace; they merely have changed the form of a portion of the available supply. The conversion process that was employed here is one which any reasonably intelligent eighth-grader, after reading the chemist's testimony in this case, could readily replicate. That being so, is the police action, while technically a violation, really sufficiently egregious to merit the condemnation which we heap upon it? Standing alone, without reference to where, when or whom, does this conversion by the police shock the conscience of the court? I suggest that it ought not.

There is yet another aspect of this case that is disturbing: at some point in time the police converted cocaine powder to co-

caine rock. Does it matter when? Should it? The point, however, is that what the police did in this case is to *deliver* that cocaine rock in a reverse sting operation, which is condoned by specific statutory authority. Are we now and in all future cases to explore the *source* of the contraband? It seems to me that an affirmative answer to this question is pregnant with adverse implications. For example, suppose the cocaine rock produced by the police is in some way distinctive. Suppose, then, that the police sell several rocks in this reverse sting operation. One of the buyers goes across town and resells a rock to an undercover agent conducting a sting operation. He is immediately arrested. Remember the source of the cocaine rock: it was illegally "manufactured" by the police. Have the seller's due process or other constitutional rights been violated? I strongly suggest a negative answer. As a judge, I would not relish the task of drawing an esoteric line between the "new" product and the "second hand" product in future cases.

In summary, while I may personally deplore the operation of stings and reverse stings in close proximity to schools, what we do in this case will not deter that activity. It will simply send the message that the police may not use "manufactured" drugs in those operations. In my view this misses the point. And along the way we vindicate the due process right of a drug purchaser (and all drug dealers under similar circumstances) not to have the police ensnare him with rock cocaine bearing the taint of having been illegally "manufactured" by the police. In my judgment this is not a worthwhile endeavor, and therefore I dissent.

LETTS, Judge, specially concurring.

I must protest Judge Hersey's dissent.

In the first place, I do *not* perceive that police stings and reverse stings near schools are "the real tragedy" nor do I "deplore" them.

My agreement with the majority is predicated on my belief that it is a denial of due process to allow the police to manufacture this deadly form of drug and then distribute it. To suggest that cocaine rocks are simply another converted form of cocaine, and no more, may be technically correct, but in practice, the two forms are worlds apart.

Robert RIVERA, Appellant,

v.

STATE of Florida, Appellee.

No. 90–0858.

District Court of Appeal of Florida, Fourth District.

Feb. 5, 1992.

Motion for Certification and/or Stay of Mandate Denied March 18, 1992.

Appeal from the Circuit Court for Broward County; Thomas M. Coker, Jr., Judge.

Richard L. Jorandby, Public Defender and Joseph S. Shook, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Melvina Flaherty, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Reversed and remanded on the authority of *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1992).

LETTS, DELL and WARNER, JJ., concur.

1

Leon WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 90-1778.

District Court of Appeal of Florida, Fourth District.

Feb. 5, 1992.

On Motion for Certification March 5, 1992.

Appeal from the Circuit Court for Broward County; William P. Dimitrouleas, Judge.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Reversed and remanded for further proceedings in accord with *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1992).

ANSTEAD, DELL and FARMER, JJ., concur.

ON MOTION FOR CERTIFICATION

ORDERED that appellee's motion filed February 20, 1992, for certification is hereby granted, and the following question is certified to the Florida Supreme Court:

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?

FURTHER ORDERED that appellee's motion filed February 20, 1992, to stay mandate is hereby denied.

2

Shawn SCOTT, Appellant,

v.

STATE of Florida, Appellee.

No. 91-0132.

District Court of Appeal of Florida, Fourth District.

Feb. 5, 1992.

Appeal from the Circuit Court for Broward County; Paul Backman, Judge.

Richard L. Jorandby, Public Defender, and Robert Friedman, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Patricia G. Lampert, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Reversed and remanded on the authority of *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA 1992).

DOWNEY, LETTS and WARNER, JJ., concur.

3

Donnie Everett GIBSON, Appellant,

v.

STATE of Florida, Appellee.

No. 90-3406.

District Court of Appeal of Florida, First District.

Jan. 6, 1992.

On Motion for Certification Feb. 11, 1992.

An Appeal from the Circuit Court for Bay County; Clinton Foster, Judge.

Nancy A. Daniels
Glen P. Gifford, Ass
lahassee, for appel

Robert A. Butter
Bradley R. Bischof
lahassee, for appel

JOANOS, Chief

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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

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

JAMES GORDON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-0972.

L.T. CASE NO. 92-1822 CF.

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

Opinion filed February 10, 1993

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

Richard L. Jorandby, Public Defender, and Ellen Morris, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Dawn S. Wynn, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. See Metcalf v. State, No. 92-0885 (Fla. 4th DCA Jan. 27, 1993).

GLICKSTEIN, C.J., GUNTHER, J., and DOWNEY, JAMES C., Senior Judge, concur.

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

JAMES GORDON

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 92-00972

L.T. CASE NO 92-1822 CF
BROWARD

March 16, 1993

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed February 23, 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

/CH

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

CHARLES BAKER, Appellant,	)	
v.	)	CASE NO. 92-0946.
STATE OF FLORIDA, Appellee.	)	L.T. CASE NO. 92-2709CF10A.

Opinion filed February 3, 1993

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

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

Richard L. Jorandby, Public Defender, and Allen J. DeWeese, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melvina Racey Flaherty, Assistant Attorney General, West Palm Beach, for appellee.

LETTS, J.

This cause is affirmed on the authority of Metcalf v. State, No. 92-0885 (Fla. 4th DCA Jan. 27, 1993).

HERSEY and GUNTHER, JJ., concur.

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

CHARLES BAKER

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 92-00946

L.T. CASE NO 92-2709 CFA10A
BROWARD

March 11, 1993

BY ORDER OF THE COURT:

ORDERED that appellant's February 17, 1993, Motion for Rehearing, for Rehearing En Banc, and for Certification is hereby denied.

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

MARILYN BEUTTENMULLER
CLERK.

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

/PB

15

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

ROBERT BURATY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-2205.

L.T. CASE NO. 92-11334CF.

Opinion filed March 31, 1993

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

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

Richard L. Jorandby, Public Defender, and Eric M. Cumfer, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed on the authority of Metcalf v. State, 18 Fla. L. Weekly D381 (Fla. 4th DCA Jan. 27, 1993).

DELL, WARNER and POLEN, JJ., concur.

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

HORACE STYLES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-1608.

L.T. CASE NO. 92-7756CF.

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

Opinion filed March 31, 1993

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

Richard L. Jorandby, Public Defender, and Robert Friedman, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed on the authority of Metcalf v. State, 18 Fla. L. Weekly D381 (Fla. 4th DCA Jan. 27, 1993).

DELL, WARNER and POLEN, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Dawn Wynn, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 9th day of April, 1993.

ANTHONY CALVELLO
Assistant Public Defender