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IN THE SUPREME COURT OF FLORIDA

ROBERT BURATY,

Petitioner,

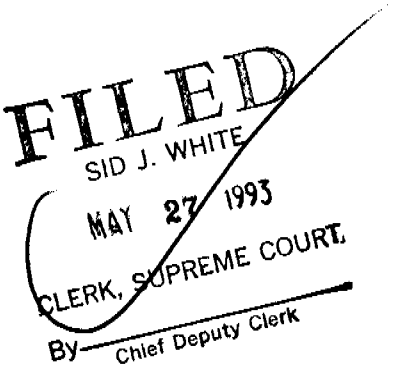
v.

STATE OF FLORIDA,

Respondent

Case No. 81864

DCA Case no. 92-2205



PETITIONER'S BRIEF ON JURISDICTION

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

ERIC M. CUMFER,
Assistant Public Defender

Attorney for Robert Buraty

TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner was the Defendant in the Circuit Court, Seventeenth Judicial Circuit in and for Broward County and the Appellant before the District Court of Appeal, Fourth District. The Respondent was the Plaintiff in circuit court and Appellee in district court. In this brief, the parties will be referred to as Mr. Buraty and the State.

STATEMENT OF THE CASE AND FACTS

On June 19, 1992, the State charged Mr. Buraty by information with the offense of solicitation to deliver cocaine on June 5, 1992. At arraignment, the State agreed that the crack cocaine used in this case had been manufactured by the Broward County Sheriff's Office. The court agreed it would permit a nolo contendere plea so that Mr. Buraty could appeal the denial of a motion to dismiss the charge because the cocaine had been illegally manufactured by the Sheriff. On July 6, 1992, Mr. Buraty then pled to the charge of solicitation to deliver cocaine, reserving his right to appeal. The court withheld adjudication and placed Mr. Buraty on a drug probation for one year.

Notice of appeal to the Fourth District was filed July 22, 1992. On July 26, 1992, the circuit court filed a written order denying the motion to dismiss nunc pro tunc to July 6. An amended notice of appeal was filed August 12, 1992.

Mr. Buraty argued on appeal that the use of manufactured cocaine in this case violated the due process of law. On March 31, 1993, the Fourth District affirmed. Its entire opinion read "Affirmed on authority of Metcalf v. State, 18 Fla.L. Weekly D381 (Fla. 4th DCA Jan. 27, 1993)." Buraty v. State, 18 Fla.L. Weekly D 864 (Fla. 4th DCA March 31, 1993). On April 12, 1992, Mr. Buraty filed a Motion for Clarification or to Certify a Question of Great Public Importance. The Fourth District denied this order on April 28, 1993.

Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court was filed with the Fourth District on May 26, 1993.

SUMMARY OF THE ARGUMENT

Mr. Buraty argued on appeal that the charge of solicitation to deliver should have been dismissed because the police manufactured the cocaine in question which Mr. Buraty bought. The Fourth District issued a summary affirmance, citing to Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), pet. for review pending (Fla.S.Ct. 81,612)(copy in Appendix).

This Court has jurisdiction because the citation to Metcalf shows that the Fourth District was explicitly deciding the bounds of the due process of law as guaranteed by the Florida and Federal Constitution. Review is pending in Metcalf and so this Court's decision in Metcalf, if it accepts review, could conflict with the Fourth District's decision below. Also, since this Court is reviewing the same question of law in Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992)(Fla.Sup.Ct. 79,507), this Court has jurisdiction since the decision in Williams may conflict with the Fourth District's decision.

ARGUMENT

THE AFFIRMANCE OF PETITIONER'S CONVICTION FOR SOLICITATION TO DELIVER COCAINE WHEN THE COCAINE IS MANUFACTURED BY THE POLICE, CONSTRUES THE DUE PROCESS CLAUSE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS AND REQUIRES THIS COURT'S REVIEW.

The Fourth District in a "citation PCA," has implicated the the due process of law as guaranteed by Article I, §9 of the Florida Constitution and the Fourteenth Amendment to the Federal. It concerns a point of constitutional law presently pending before this Court and so requires this Court's review. This Court has jurisdiction because the Fourth District has construed these provisions of the Florida and Federal constitutions and concerns an issue of law in a case which may be in conflict with the district court decision when this Court issues its decision. Article V, § 3(b)(3), Fla. Const.

In 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, 614 So. 2d 548 (Fla. 4th DCA 1993), pet. for review pending (Fla.S.Ct. 81,612) (copy in Appendix). If this Court accepts Metcalf for review and rules on it, it should also accept this case pursuant to the rule of Jollie. See Taylor v. State, 601 So. 2d 540, 541 (Fla. 1992).

Even should this Court deny review in Metcalf, it should still accept review in this case because this Court is deciding the same issue in Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992) (Fla.Sup.Ct. 79,507). Petitioner acknowledges that the instant case presents this Court with a jurisdictional twist because

Metcalf itself is not the case in which the issue is pending. However, Metcalf, in holding that a conviction for solicitation of an undercover police officer to deliver cocaine manufactured by the police was not a due process violation, distinguished Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992) (copy in Appendix), which had held due process was violated for convicting one of purchasing cocaine when the police manufacture it. This Court denied review of Kelly. Kelly v. State, 599 So. 2d 1280 (Fla. 1992). However, it accepted review of the Kelly issue in Williams; thus, the Kelly/Metcalf issue is now pending before this Court. Should this Court rule in Williams that the deterrence of police misconduct requires drug charges which arose as a forseeable result of that misconduct to be dismissed, the ruling of the Fourth District in this case will conflict with this Court's Williams decision.

To deny review because the Fourth District cited Metcalf instead of Williams 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. This important issue is affecting numerous cases.[1]

---

[1] Besides the instant case and Metcalf, some other Fourth District cases which have affirmed on authority of Metcalf are Gordon v. State, 18 Fla.L. Weekly D470 (Fla. 4th DCA Jan. 27, 1993); Lacy v. State, 18 Fla.L. Weekly D520 (Feb. 17, 1993), pet. review pending (Fla.S.Ct. 81,615); Baker v. State, 18 Fla.L. Weekly D432 (Fla. 4th DCA Feb. 3, 1993), pet. review pending (Fla.S.Ct. 81,614); Styles v. State, 18 Fla.L. Weekly D865 (Fla. 4th DCA March

If this Court does not review Metcalf and this case, it 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.

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. This case illustrates the futility of stopping police misconduct by refusing only to permit convictions for purchase of cocaine but allowing solicitation to deliver charges for that same cocaine to stand: the transaction at issue here occurred in June, several months after the Fourth District denounced manufacture of cocaine as illegal in its January 3, 1993 decision in Kelly. The police in Broward continue their felonious activities and will do so unless stopped by the courts.

In Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992), this Court ruled that the equal protection of the laws and fair treatment of litigants requires that once the law is applied to one person on appeal, it must be applied to all those whose appeals are then pending. That same principle of equal treatment should apply as well to litigants who are seeking review of related issues before this court. It would be unfair to grant review to one litigant while denying that review to another simply because the

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31, 1993); Lane v. State, 18 Fla.L. Weekly D470 (Jan. 27, 1993); Levine v. State, 18 Fla.L. Weekly D432 (Feb. 3, 1993).

case cited by a district court as authoritative was not accepted for review by this Court but another case with the identical issue was considered. It is this principle of fairness - although not then connected to the equal protection of the laws - which underlay this Court's direction in Jollie that the district courts should develop a process so that multiple cases with the same issues could all be addressed by this Court.

> To resolve fully this problem, we further suggest that the district courts devise one or more methods to distinguish a contemporaneous or companion case - for example, with distinguishing citation signals or by certifying that an identical point is at issue in the cited case [footnote omitted] - from cases which offer a mere counsel notification citation. We have no doubt that district court judges can produce one or more methodologies to preserve the review strictures of the 1980 amendment on the one hand, while on the other eliminating the possible injustice inherent in foreclosing review to some of several equally situated litigants.

Jollie, 405 So. 2d at 421. That principle of fairness, as guaranteed by the equal protection of the laws, requires this Court to review this case since it involves an explicit discussion of the meaning of the due process of law and concerns an issue now pending before this Court in Williams and potentially pending in Metcalf.

CONCLUSION

For the foregoing reasons, Mr. Buraty respectfully requests this Court to take jurisdiction of this cause.

Respectfully submitted,

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

ERIC M. CUMFER
Assistant Public Defender,
Fla. Bar no. 0764663

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to SARAH MAYER, Esq., Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 26th day of May, 1993.

Attorney for Robert Buraty

IN THE SUPREME COURT OF FLORIDA

ROBERT BURATY, Petitioner, v. STATE OF FLORIDA, Respondent	Case No. _____ DCA Case no. 92-2205

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
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6th Floor, 421 Third Street
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(407) 355-7600

ERIC M. CUMFER,
Assistant Public Defender

Counsel for Appellant

CONTENTS

APPENDIX A

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.

APPENDIX B

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

ROBERT BURATY

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 92-02205

L.T. CASE NO 92-11334 CF
BROWARD

April 28, 1993

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed April 12, 1993, for clarification or to certify 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: Attorney General-W. Palm Beach
Public Defender 15

/CH

EC

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,

FOURTH DISTRICT

ROBERT BURATY, Defendant/Petitioner, v. STATE OF FLORIDA, Plaintiff/Respondent.	DCA CASE NO. 92-2205 L.T. NO. 92-11334 CF BROWARD

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

NOTICE IS GIVEN by the Appellant, ROBERT BURATY, by undersigned counsel, that he is invoking the discretionary jurisdiction of the Florida Supreme Court to review the decision of Buraty v. State, 18 Fla.L. Weekly D864 (Fla. 4th DCA March 31, 1993) upon which a motion for clarification or to certify a question was denied on April 28, 1993. The decision involves a similar question of law now pending before the Florida Supreme Court and so expressly and directly conflicts with a decision of the Florida Supreme Court. See Rules 9.030(a)(2)(A)(iv) and 9.120, Florida Rules of Appellate Procedure; Article V, §3(b)(3) of the Florida Constitution; Jollie v. State, 405 So.2d 418 (Fla. 1981).

Respectfully submitted,

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

ERIC M. CUMFER, Fla. Bar no. 0764663
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to SARAH B. MAYER, Esq., Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 25th day of May, 1993.

Of counsel

APPENDIX D

Mattson & Tobin and James S. Mattson, Key Largo, Michael Halpern, Key West, Erol M. Vural, P.A., Summerland Key, for appellants/cross-appellees.

Apgar & Theriaque and Robert C. Apgar, Tallahassee, Randy Ludacer, Monroe Cty. Atty., Key West, G. Steven Pfeiffer and Sherry A. Spiers and David L. Jordan, Tallahassee, for appellees/cross-appellants.

Before COPE, LEVY and GERSTEN, JJ.

PER CURIAM.

The order denying attorney's fees is affirmed on authority of *Couf v. DeBlaker*, 652 F.2d 585 (5th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (1982); and *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983); *see County Line Joint Venture v. City of Grand Prairie, Texas*, 839 F.2d 1142 (5th Cir.), *cert. denied*, 488 U.S. 890, 109 S.Ct. 223, 102 L.Ed.2d 214 (1988); *Quinn v. Bryson*, 739 F.2d 8 (1st Cir.1984); *see also Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Sharrow v. City of Dania*, 83 So.2d 274 (Fla.1955). *See generally Farrar v. Hobby*, — U.S. —, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

As to the cross-appeal, we affirm.

Affirmed.

1

Arnett LEE, Sr., et al., Appellants,

v.

GRAY CAB CO., et al., Appellees.

No. 91–2170.

District Court of Appeal of Florida, Third District.

Jan. 26, 1993.

Rehearing Denied March 30, 1993.

An Appeal from the Circuit Court for Dade County; Jon I. Gordon, Judge.

Ellen G. Lyons, Miami, for appellants.

Wallace, Engels, Pertnoy, Solowsky & Allen and Todd R. Legon, Miami, for appellees.

Before HUBBART, NESBITT and BASKIN, JJ.

PER CURIAM.

Affirmed. § 678.319, Fla.Stat. (1991); *Canell v. Arcola Housing Corp.*, 65 So.2d 849 (Fla.1953); *Khawly v. Reboul*, 488 So.2d 856 (Fla. 3d DCA 1986); *Ashland Oil, Inc. v. Pickard*, 269 So.2d 714 (Fla. 3d DCA 1972), *cert. denied*, 285 So.2d 18 (Fla. 1973).

2

Barbara METCALF, Appellant,

v.

STATE of Florida, Appellee.

No. 92–0885.

District Court of Appeal of Florida, Fourth District.

Jan. 27, 1993.

Rehearing, Rehearing En Banc and Certification Denied March 16, 1993.

Motion to dismiss by defendant convicted of solicitation to deliver cocaine in reverse sting investigation was denied by the Circuit Court, Broward County, Robert Fogan, J. Appeal was taken. The District Court of Appeal, Stone, J., held that defendant could be convicted of solicitation, even if due process prohibited prosecution for purchase of cocaine unlawfully manufactured by sheriff's lab.

Affirmed.

Farmer, J., concurred and filed opinion.

Cite

1. Drugs and Narcotics ⇐61

Defendant could be convi
tation to deliver cocaine, ever
process prohibited prosecution
for purchase of unlawfully
cocaine in reverse sting ope
was not required to prove co
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solicitation. West's F.S.A.
U.S.C.A. Const.Amends. 5, 1

2. Criminal Law ⇐45

Crime of "solicitation" is
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ments are present when defe
or encourages other party to
West's F.S.A. § 777.04(2).

See publication Words a
for other judicial constru
definitions.

3. Criminal Law ⇐36.5

Unlawful transfer of dru
in solicitation prosecution
sting operation. West's F.S.

Richard L. Jorandby, Pu
and Louis G. Carres, Asst.
er, West Palm Beach, for

Robert A. Butterworth, A
hassee, and Joseph A. Tring
Gen., West Palm Beach, fo

STONE, Judge.

The issue is whether a
otherwise would be dischar
ed for the *purchase* of coca
Kelly v. State, 593 So.2d
DCA), *rev. denied*, 599 S
1992), may nevertheless
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arrested the Defendant
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crack cocaine unlawfully
the sheriff's lab, a circums
Court has determined is a
lation. *Kelly*. The trial
pellant's motion to dismi

[1] Section 777.04(2),
provides:

Whoever solicits anothe
offense prohibited by

1. Drugs and Narcotics ⇐61

Defendant could be convicted of solicitation to deliver cocaine, even though due process prohibited prosecution of defendant for purchase of unlawfully manufactured cocaine in reverse sting operation; state was not required to prove completed purchase in order to convict potential buyer of solicitation. West's F.S.A. § 777.04(2); U.S.C.A. Const.Amends. 5, 14.

2. Criminal Law ⇐45

Crime of "solicitation" is complete prior to any purchase or delivery; all elements are present when defendant entices or encourages other party to commit crime. West's F.S.A. § 777.04(2).

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐36.5

Unlawful transfer of drug is irrelevant in solicitation prosecution arising from sting operation. West's F.S.A. § 777.04(2).

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

Robert A. Butterworth, Atty. Gen., Tallahassee, and Joseph A. Tringali, Asst. Atty. Gen., West Palm Beach, for appellee.

STONE, Judge.

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.

[1] 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.

[2] 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.

[3] 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, Judge, 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.

1

Billy Wayne HILL, Appellant,

v.

STATE of Florida, Appellee.

No. 92–1262.

District Court of Appeal of Florida, Fourth District.

Jan. 27, 1993.

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

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

Robert A. Butterworth, Atty. Gen., Tallahassee, and Dawn S. Wynn, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Affirmed. *See Metcalf v. State*, 614 So.2d 548 (Fla. 4th DCA 1993).

GLICKSTEIN, C.J., and OWEN, WILLIAM C., Jr., Senior Judge, concur.

FARMER, J., concurs specially with opinion.

FARMER, Judge, concurring specially.

I concur only for the reason I expressed in *Metcalf v. State*, 614 So.2d 548 (Fla. 4th DCA 1993).

2

Tim BIRGE and Margaret Birge, Appellants,

v.

CITY OF EAGLE LAKE, Appellee.

No. 92–02109.

District Court of Appeal of Florida, Second District.

Jan. 27, 1993.

Rehearing Denied Feb. 26, 1993.

Homeowners brought action against city for damages they incurred when lightning struck transformer t
city's sewage pumping statio
backed up into their home.
Court, Polk County, Dennis P
entered summary judgment
city, and plaintiffs appealed.
Court of Appeal, Hall, J., h
could not be held liable for fa
warning system at sewage pu
that would be immune to l

Affirmed.

1. Municipal Corporations

Governmental entity is
its failure to build, expand, c
capital improvement.

2. Municipal Corporations

City could not be held li
to install warning system at
ing station that would be im
failure.

C. Kenneth Stuart, Jr. of
ly, P.A., Lakeland, for app

Daniel F. Pilka and Steve
of Sawyer & Pilka, P.A., B
pellee.

HALL, Judge.

[1] We affirm the sum
entered in favor of the City
in the Birges' action against
they incurred when lightn
transformer that powered
age pumping station and se
into the Birges' home. We
trial court that the gist of
gations of liability against
the city failed to install a
for its sewer system that w
to a power failure. Wh
sympathize with the Birg
we are constrained by the
clear pronouncement that
entity is not liable for its
expand, or modernize a
ment. *Trianon Park*
Ass'n, Inc. v. City of Hi
912 (Fla.1985).

APPENDIX E

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.

APPENDIX F

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to SARAH MAYER, Esq., Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 27th day of May, 1993.

Eric M. Cumbie
Of counsel