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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,864

**ROBERT BURATY,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

\*\*\*\*\*  
ON PETITION FOR DISCRETIONARY REVIEW  
\*\*\*\*\*

RESPONDENT'S BRIEF ON JURISDICTION

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### PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Respondent, State of Florida, was the Appellee and the prosecution, respectively, in the lower courts. In this Brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "PA" will be used to refer to Petitioner's Appendix, which is a conformed copy of the District Court's opinion.

All emphasis has been added by Respondent unless otherwise indicated.

**STATEMENT OF THE CASE AND FACTS**

The only facts relevant to a determination of this Court's jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(ii) are those set out in the opinion sought to be reviewed. That opinion simply states:

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

(PA 1). Respondent takes exception to the extent that Petitioner's Statement of the Case and Facts refers to record materials outside the four corners of the district court opinion. Furthermore, Petitioner has omitted the following pertinent facts:

Appellant entered into a written plea agreement admitting there was a factual basis for the charge of solicitation (R. 11). Adjudication of guilt was withheld (R. 11, 14).

### SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal did not expressly construe the State or Federal Constitutions. Thus, no basis lies for this Court to exercise its discretionary jurisdiction.

## ARGUMENT

THE DECISION BELOW DOES NOT EXPRESSLY CONSTRUE  
THE STATE OR FEDERAL CONSTITUTIONS AND THIS  
COURT SHOULD DENY PETITIONER'S REQUEST FOR REVIEW.

Petitioner maintains that the Fourth District's decision below involves an interpretation of the Due Process clauses of the Florida and United States Constitutions. Respondent acknowledges that the Metcalf decision cited in the Fourth District's opinion makes reference to due process. However, the Fourth District did not in any manner construe the Constitution in the instant case. Thus, this Court should decline to exercise its discretionary jurisdiction.

It is axiomatic that in order to establish this Court's conflict jurisdiction, or to establish jurisdiction on the basis that a district court opinion affects a class of constitutional officers, the basis for the discretionary review must appear on the face of the district court opinion. See School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985). This requirement of expression on the face of the opinion extends to constitutional construction as well.

In order to expressly construe a provision of the federal or state constitutions for the purpose of invoking this Court's discretionary jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(ii), a district court's decision must explicitly "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." Ogle v. Pepin, 273 So. 2d 391, 393 (Fla. 1973) (quoting Armstrong v. City of Tampa, 106 So.

2d 407, 409 (Fla. 1958)). In the case at bar, neither the Florida Constitution nor the United States Constitution was construed within the meaning of the above language. This is particularly true since the District Court's decision below merely relied upon Metcalf, another case in which due process was mentioned but not construed.

In the instant case, Petitioner was charged with solicitation to deliver cocaine within 1000 feet of a school. Petitioner relies upon Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), and Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992). He incorrectly argues that the instant case, if not reviewed, will gut any decision this Court may render in Williams. However, unlike Kelly and Williams, no substance was necessary to prove Petitioner's crime. State v. Johnson, 561 So.2d 1321, 1322 (Fla. 4th DCA 1990). Even if the act of "manufacturing" the crack cocaine constituted outrageous police conduct, that act has nothing to do with the crime of solicitation. Thus, the Fourth District's decision did not construe a constitutional provision and this Court's jurisdiction does not lie.

Petitioner's reliance upon Jollie v. State, 408 So. 2d 418 (Fla. 1981), to establish jurisdiction is also questionable. Pursuant to Jollie, a district court's decision which cites as controlling authority a decision which is **either pending review in or has been reversed by this Court** will constitute prima facie express conflict over which this Court may exercise its discretionary jurisdiction. Jollie, 405 So. 2d at 420. Although



the defendant in Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993), has sought to invoke this Court's jurisdiction, jurisdiction has not yet been accepted. In the event this Court declines to accept jurisdiction in Metcalf, there is no basis for this Court to exercise jurisdiction in the instant case.

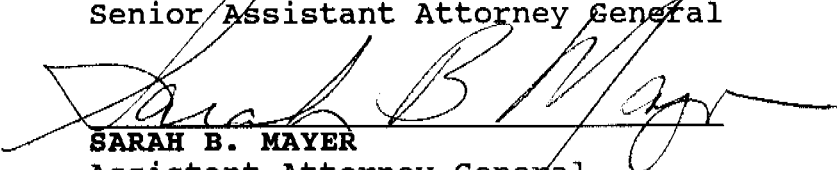
**CONCLUSION**

WHEREFORE, based upon the foregoing argument and the authorities cited therein, Respondent respectfully requests this Honorable Court decline to accept discretionary jurisdiction in the instant case.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by Courier to: ERIC M. COMFER, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida, this 11th day of June, 1993.



Of Counsel