IN THE SUPREME COURT OF FLORIDA

HAROLD LINFORD GREEN,

Petitioner/Appellee,

v.

STATE OF FLORIDA,

Respondent/Appellant.

Case No. 81,977

DCA Case no. 92-2523

# PETITIONER'S BRIEF ON JURISDICTION

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## PRELIMINARY STATEMENT

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

## STATEMENT OF THE CASE AND FACTS

In Seventeenth Judicial Circuit case 91-16179 CF, the State of Florida charged Mr. Green by information with the purchase of cocaine. That charge was dismissed on January 31, 1992 pursuant to Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA), rev. denied 599 So.2d 1280 (Fla. 1992).

Later on January 31, 1992, the State filed a new information in Seventeenth Circuit case 92-2397 CF charging Mr. Green with soliciation to deliver cocaine on August 23, 1991. Mr. Green again moved to dismiss the charge. On July 31, 1992, the trial court found the new charge was based on the same conduct as that in 91-16179 and dismissed the new charges, ruling that cocaine in question was manufactured by the police and the decision was governed by Kelly. The state filed a notice of appeal.

The Fourth District Court of Appeal reversed based on Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), pet. for review pending (Fla. 81,612) which held that charges of solicitation to deliver cocaine may be brought even when the police manufacture cocaine and sell it. The Fourth District also held double jeopardy principles did not bar the State from refiling the charge.

Mr. Green filed a notice of appeal invoking the discretionary jurisdiction of this Court on June 21, 1993.

## SUMMARY OF THE ARGUMENT

Mr. Green argued on appeal that the charge of solicitation to deliver was properly dismissed by the trial court because the police manufactured the cocaine in question which Mr. Green bought. The Fourth District reversed, citing Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), pet. for review pending (Fla. 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

A DECISION PERMITTING PROSECUTION 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's decision 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 Fourth District summarily cited Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), pet. for review pending (Fla. 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), pet. review pending (Fla. 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), rev. denied 599 So.2d 1280 (Fla. 1992) (copy in Appendix), which had held due process was violated for convicting one of purchasing cocaine when the police manufacture it. Similarly, the district court below cited to Kelly and Grissett v. State, 594 So.2d 321 (Fla. 4th DCA), appeal dimissed 599 So.2d 1280 (Fla. 1992) and distinguished them based on Metcalf. 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, Kelly, and Grissett 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] 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.

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 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

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[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 (Fla. 4th DCA Feb. 17, 1993), pet. review pending (Fla. 81,615); Baker v. State, 18 Fla.L. Weekly D432 (Fla. 4th DCA Feb. 3, 1993), pet. review pending (Fla. 81,614); Styles v. State, 18 Fla.L. Weekly D865 (Fla. 4th DCA March 31, 1993); Lane v. State, 18 Fla.L. Weekly D470 (Fla. 4th DCA Jan. 27, 1993); Levine v. State, 18 Fla.L. Weekly D432 (Fla. 4th DCA Feb. 3, 1993); Buraty v. State, 18 Fla.L. Weekly D864 (Fla. 4th DCA March 31, 1993), pet. review pending (Fla. 81,864).

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. Green respectfully requests this Court to take jurisdiction of this cause.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to JAMES J. CARNEY, Esq., Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 21st day of June, 1993.

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