IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

DCA CASE NO. 92-2523

81,977

HAROLD LINFORD GREEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Respondent's Brief on Jurisdiction

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PRELIMINARY STATEMENT

Petitioner was the appellee in the Fourth District Court of Appeal and the defendant in the trial court. Respondent was the appellant and the prosecution, respectively, in those courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent does not agree with the "facts" in petitioner's brief that are not part of the opinion. See Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority's decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.").

The State appealed from trial court's order granting petitioner's motion to dismiss the information charging solicitation to deliver cocaine. The trial court found that the police had manufactured the crack cocaine used and that its use constituted an integral part of the transaction whether charged as purchase of cocaine or solicitation to purchase cocaine. The Fourth District reversed, citing Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), pet. for review pending (Case no. 81,612) where the District Court expressly rejected the reasons given by the trial court in its order of dismissal. The Fourth District also found petitioner's double jeopardy argument without merit.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in this case does not directly and expressly conflict with a decision of this Court. It also does not expressly construe a constitutional provision.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH ANY DECISIONS OF OTHER DISTRICT COURTS OR THIS COURT. THE DECISION DOES NOT EXPRESSLY CONSTRUE THE STATE OR FEDERAL CONSTITUTION.

For two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975).

In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term 'express' include: 'to represent in words'; to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary (1961 ed. unabr.)

See generally Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlacoochee River Electric Co-op v. Tampa Electric Company, 158 So.2d 136 (Fla. 1963), cert. denied, 377 U.S. 952, 84 S.Ct. 1628, 12 L.Ed.2d 497 (1964); and England and Williams, Florida Appellate Reform One Year Later, 9 F.S.U. L. Rev. 221

(1981). See also Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 210 (Fla. 1976) (This Court's discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants).

The scant opinion in this case does not conflict with Williams v. State, 18 Fla. L. Weekly S371 (Fla. July 1, 1993). As explained in Metcalf v. State, 614 So. 2d 548 (Fla. 4th DCA 1993), pet. for review pending (Case no. 81,612), the issues involved are totally different. The substance involved is not an element of solicitation.

Petitioner's reliance on Jollie v. State, 405 So. 2d 418 (Fla. 1981) is also questionable. Under Jollie, a district court's decision that cites as controlling authority a decision that is either pending review or has been reversed by this Court will constitute prima facie express conflict discretionary jurisdiction. Id. at 420. Although the defendant in Metcalf has sought to invoke this Court's jurisdiction, jurisdiction has not been accepted. It this Court declines jurisdiction in Metcalf there is no basis to exercise jurisdiction in this case.

This opinion also does not expressly construe the State or Federal Constitution. Respondent acknowledges that the Metcalf decision cited in the Fourth District's opinion refers to due process. However, the Fourth District did not construe the Constitutional in this case.

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 extends to constitutional construction.

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 this case, neither constitution was construed within the meaning of this language. This is particularly true since the Fourth District's decision merely relied upon Metcalf, another case in which due process was mentioned but not construed.

Here, petitioner was charged with solicitation to deliver cocaine within 1000 feet of a school. Petitioner relies on Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992) and Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992). 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 constituted outrageous police misconduct, that act had nothing to do with the crime of solicitation. Thus, the Fourth District's opinion did not construe a constitutional provision.

CONCLUSION

Based on the preceding argument and authorities, this Court should decline to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Eric Cumfer, Criminal Justice Building, 421 3rd Street, W. Palm Beach, FL 33401, this 12 day of July 1993.

Of Counsel