

**FILED**

SID J. WHITE

SEP 18 1991

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT FLORIDA

JOSEPH BAXTER, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 GAVIN K. LETTS, BOBBY GUNTHER, )  
 EUGENE S. GARRETT, Judges of )  
 the District Court of Appeal, )  
 Fourth District of Florida, )  
 )  
 Respondents. )

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CASE NO. 78,294

RESPONSE TO RESPONDENT'S ANSWER TO SHOW CAUSE ORDER

Petitioner files his response to the respondent's answer to this Court's show cause order and states:

1. Respondent proposes that this Court deny the writ based on a fiction that the petitioner had counsel during the State's appeal because his trial counsel never moved to withdraw and the state served him notice of the appeal and a copy of the appellant's initial brief. The district court's decision and petitioner's affidavit show that his privately retained attorney in the circuit court, Andrew Washor, did not actually represent petitioner on the state's appeal; Washor did not confer with petitioner, make a presentation on his behalf or do anything at all in the district court and the district court noted, "No appearance for appellee," on the face of its decision.

The respondent's suggestion that a lawyer's name on a piece of paper during a state-initiated, critical phase of a criminal proceeding satisfies the Constitutions' mandate that the accused

enjoy the right to counsel is dispelled by reality and the reasoning in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932). There, the famous Scotsboro case, the trial court had appointed all the members of the local bar for the purpose of arraigning the defendants and then had anticipated that members of the bar would continue to help the defendants if no other counsel appeared. On the day of trial, counsel was purportedly determined during a confusing colloquy between the trial judge, a member of the local bar and an out-of-state lawyer, who came to assist but who was not employed for nor did he appear for the defendants. An unprepared body of a lawyer in the courtroom was found not to satisfy the requirements of the Constitution. The court said: "Under the circumstances described, we hold that defendants were not afforded right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." 286 U.S. at 58. The right to counsel includes the accustomed incidents of consultation and opportunity for preparation; the Scotsboro boys did not have the aid of counsel in any real sense, Id. at 60, and neither did petitioner.

The respondents insist that the state is entitled to rely on a presumption that the privately retained counsel will act in the defendant's best interests in regard to appeal on the authority of McDaniel v. State, 219 So.2d 421 (Fla 1969). Such an assumption that someone is acting as counsel, like the trial judge made in Powell v. Alabama, does not satisfy the requirements of the Constitution when in fact no lawyer is actually rendering assistance to the defendant.

Also, the issue in petitioner's case has nothing to do with whose fault it is that petitioner was not represented by counsel during the state's appeal. The question is: did petitioner have someone representing him? The answer is "no."

The presumption discussed in McDaniel referred to a claim by a defendant, represented by private counsel at trial, that he had been denied his right to a direct appeal due to state action. State action is no longer an issue in assessing such a claim, State v. Meyer, 430 So.2d 440 (Fla. 1983), Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct 1708, 64 L.Ed.2d 333 (1980). In McDaniel, the court held that the presumption may be rebutted and was, where the defendant wrote the district court to say he was indigent and wanted to appeal within the time for filing a notice of appeal. Such a presumption is clearly not applicable in these circumstances where the petitioner was incarcerated, had no actual notice of the state's appeal, was not served with a copy of the state's appeal, and where no one represented petitioner in the state initiated criminal appellate proceedings which increased petitioner's sentence of probation to 3 years in prison.

2. The respondent also invites this Court to deny the writ on the fiction that petitioner waived his right to counsel on the state's appeal by referring to that portion of the guilty plea colloquy where the defendant gave up his right to direct appeal of his conviction and sentence by his plea of guilty. This colloquy occurred before the state filed its notice of appeal. There is no basis for the state's attempt to convert this waiver of the defendant's right to direct appeal his conviction by pleading

guilty into a waiver of the defendant's right to counsel during the state's appeal to increase petitioner's sentence, particularly where petitioner did not even know the state was going to appeal.

3. Respondents assert that a lawyer would have done Mr. Baxter no good citing to a recent Fourth District case, State v. Vola, 16 FLW D2246 (Fla. 4th DCA August 28, 1991), where the Fourth District refused to certify a legal question of whether Section 893.13(1)(e)(1) took precedence over Section 397.12. However, another panel of the Fourth District did certify essentially the same legal issue to this Court one week earlier in State v. Scates, 16 FLW D2203 (Fla. August 21, 1991):

MAY A TRIAL COURT PROPERLY DEPART FROM THE  
MINIMUM MANDATORY PROVISIONS OF SECTION  
893.13(1)(e), FLORIDA STATUTES (1989)?

The precise legal issue in petitioner's case is now pending review in this Court in State v. Scates, case no. 78,533. In any event, prejudice is not an issue where the defendant was denied his right to counsel.

4. Finally, respondent's argument that the Public Defender has not been properly appointed to represent him now is totally irrelevant. The Public Defenders' Office has independent authority under Section 27.59 to represent persons who are incarcerated and to tender them advice and counsel when they have not engaged private counsel. The right of petitioner to be represented and for his undersigned counsel as a member of the Florida Bar to file this writ on his behalf is unquestionable.

Respectfully Submitted,

RICHARD L. JORANDBY  
Public Defender

*Margaret Good*

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MARGARET GOOD  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to HON. GAVIN K. LETTS, HON. BOBBY GUNTHER, and HON. EUGENE S. GARRETT, Judges of the District Court of Appeal, Fourth District, P. O. Box A, West Palm Beach, Florida 33407, and to MELYNDA MELEAR, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 16<sup>th</sup> day of September, 1991.

*Margaret Good*

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MARGARET GOOD  
Assistant Public Defender