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IN THE SUPREME COURT OF FLORIDA

TODD RUSSELL BAUMGARDNER,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)

Case No. 78,689
(4th DCA NO. 90-3337)

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the appellant below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of purchase of cocaine within one thousand feet of a school. After a **plea** of nolo contendere, the trial court, the Honorable Robert W. Tyson, Jr., found petitioner to be drug addict (crack cocaine) and placed him on two (2) years probation with a special condition that he receive drug treatment pursuant to Section 397.12, Florida Statutes (1989).

On the state's appeal, the Fourth District Court of Appeal reversed the sentence citing its recent decision in State v. Baxter, 16 FLW D1561 (Fla. 4th DCA June 12, 1991) and referred to the three year mandatory minimum set forth in Section 893.13(1)(e) as follows:

We reverse on the authority of State v. Baxter, Case No 90-3175 (Fla. 4th DCA June 12, 1991). In Baxter, we held that a trial judge cannot rely upon section 397.12, Florida Statutes, to downward depart from a mandatory minimum sentence even with valid reasons for departure. Therefore, upon remand the trial judge shall sentence appellee to the mandatory minimum sentence.

REVERSED AND REMANDED WITH DIRECTIONS FOR RESENTENCING.

State v. Baumgardner, 16 FLW D1734 (Fla. 4th DCA July 3, 1991) (Appendix-1).

After the decision was issued, the trial judge adjudicated petitioner indigent and appointed the public defender to represent him on appeal. Petitioner then requested rehearing, pointing out that the decision noted "no appearance for appellee," that he was indigent and without counsel during the state initiated criminal proceedings to increase petitioner's sentence from probation to 3 years (Appendix-2-15), which motion was denied on September 4, 1991, Judge **Polen** dissenting from the court's failure to certify

the question involved in this **case** to the Supreme Court as the court had done in the recent case of State v. Scates, 16 FLW D2203 (Fla. 4th DCA August 21, 1991). (Appendix-16-18).

On August 21, 1991 in State v. Scates, the Fourth District Court of Appeal cited State v. Lane, 16 F.L.W. 1631 (Fla. 4th DCA June 28, 1991) and State v. Baxter, supra, and certified the identical issue presented in petitioner's case as a question of great public importance to this Court. State v. Scates, supra. The certified question in Scates is:

MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(E), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989).

State v. Scates, supra (Appendix-19).

Counsel in Scates filed a notice of intent to invoke discretionary jurisdiction of this Court on August 22, 1991 and that case is now pending in this Court in case number 78,533. Petitioner thereupon noticed his intent to invoke this court's discretionary jurisdiction to review this cause on September 25, 1991. This jurisdictional brief follows.

SUMMARY OF ARGUMENT

The decision in the present case cites as controlling authority State v. Baxter, 16 FLW D1561 (Fla, 4th DCA June 12, 1991), which is now pending review in this Court under Baxter v. Letts, case no. 78,294. Petitioner, like Mr. Baxter, was indigent and not represented by counsel during the state initiated criminal proceedings to increase his sentence from probation to 3 years in prison. Since this Court has jurisdiction of Baxter, it also has jurisdiction to review the decision in petitioner's case which presents the identical issue.

The decision in the present case cites Baxter as controlling authority. In State v. Scates, 16 FLW D2203 (Fla. 4th DCA August 21, 1991) (Appendix - 19), a case which the Fourth District Court of Appeal said "presents a factual scenario identical to those presented in State v. Lane, 16 FLW 1631 (Fla 4th DCA June 28, 1991), and State v. Baxter, 16 FLW 1561 (Fla. 4th DCA June 21, 1991)," the Court certified to this Court a question of great public importance:

MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989).

(Appendix - 19).

Since this Court has jurisdiction of Scates, it also has jurisdiction to review the decision in Petitioner's case which presents the identical issue. Article V, § 3(b)(4), Florida Constitution.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE **FOURTH** DISTRICT COURT OF APPEAL BELOW WHICH HAS CITED **AS** CONTROLLING AUTHORITY BAXTER V. STATE WHICH IS PENDING REVIEW IN THIS COURT AND WHICH WAS SUBSEQUENTLY CITED IN A CASE WHICH CERTIFIES THE IDENTICAL ISSUE TO THIS COURT AS A QUESTION OF **GREAT** PUBLIC IMPORTANCE.

Article V, § 3(b)(4) of the Constitution of Florida empowers this Court to review any decision of a district court of appeal which certifies to this Court a question of great public importance. The present case cited as controlling authority State v. Baxter, which was cited as controlling authority in a subsequent case by the Fourth District which certifies the identical issue to this Court as a question of great public importance. State v. Scates, Case No. 90-3174 (Fla. 4th DCA Opinion filed August 21, 1991) (Appendix 16-18). Scates is pending review in this Court (Appendix 19). In that case, the district court reviewed "...a factual scenario identical to [that] in State v. Lane, 16 F.L.W. 1631 (Fla. 4th DCA June 28, 1991), and in State v. Baxter, 16 FLW 1561 (Fla. 4th DCA June 21, 1991)" (Appendix at 19). The Scates Court, citing Baxter as controlling authority, reversed the sentence of two years probation, a downward departure. The District Court in Scates held, as it did in Baxter and petitioner's case, Baumgardner, that the trial court improperly relied on Section 397.12, Florida Statutes (1989) and was bound to impose the three year mandatory minimum sentence pursuant to Section 893.13(1)(e), Florida Statutes (1989). The Scates court certified the issue as one of great public importance:

MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM **MANDATORY** PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF **THE DRUG** REHABILITATION PROVISION OF SECTION **397.12**, FLORIDA STATUTES (1989).

(Appendix 15). Although Scates certified the question prior to the denial of rehearing in petitioner's case, the Fourth District declined to certify the identical issue in petitioner's case, Judge Polen dissenting as to the denial of certification (Appendix - 16-18). However, it is obvious from the **face** of petitioner's decision that his case involves the identical legal issue involved in Scates and Baxter. The decision in petitioner's case reads:

We reverse on the authority of State v. Baxter, **Case No 90-3175 (Fla. 4th DCA June 12, 1991)**. In Baxter, we held that a trial judge cannot rely upon section **397.12**, Florida Statutes, to downward depart from a mandatory minimum sentence even with valid reasons for departure. Therefore, upon remand the trial judge shall sentence appellee to the mandatory minimum sentence.

REVERSED AND REMANDED WITH **DIRECTIONS** FOR RESENTENCING.

State v. Baumgardner, 16 FLW **D1734** (Fla. 4th DCA July 3, 1991) (Appendix-1).

Article V, **§ 3(b)(4)** of the Florida Constitution gives this Court jurisdiction to review a question of great public importance. Therefore, this Court clearly has jurisdiction in Scates. Moreover, since Scates is pending in this Court in case no **78,533**, this Court has jurisdiction in Petitioner's case. State v. Brown, **475 So.2d 1 (Fla. 1985)**; Jollie v. State, **405 So.2d 418 (Fla. 1981)**.

That the identical legal issue was certified in an subsequent case instead of a preceding case should not alter the impact of this Court's decisions in Brown and Jollie. Which of several

litigants receiving equal treatment from the district court may obtain review in this Court should not be dependent on happenstance or delayed processing in the district court. Where it is clear from the **face** of the opinion that the petitioner's case involves the identical legal issue certified to be a question of great public importance in a subsequent **case**, this Court's jurisdiction is also properly invoked on petitioner's behalf on the basis of the certified question in the other case. State v. Brown, 475 So.2d 1 (Fla. 1985).

Moreover, the instant case presents an issue which this Court should resolve. In petitioner's case, as in Scates, the sentencer relied upon Section 397.12, Florida Statutes (1989) and State v. Herrin, 568 So.2d 920 (Fla. 1990) to depart downward from the three year mandatory minimum on the basis that the petitioner was an addict who needed drug treatment. As a result of the decision in Baxter and in Scates, these individuals will forego the opportunity of rehabilitation and instead be consigned to an already **over**burdened prison system. Certainly, this is an issue which has great impact on the sentences of those individuals unfortunate enough to be affected by it.

By virtue of the Fourth District's citation Baxter as the controlling case in petitioner's case, by virtue of the Fourth District's citation to Baxter as the controlling authority in Scates and by virtue of the Fourth District's certification of the issue as a question of great public importance in Scates, Petitioner's case presents the same issue for review **as** Scates. Since Scates is pending review before this Court, this Court should

accept jurisdiction of the instant case. State v. Brown, supra;
Jollie v. State, supra.

There is an alternative basis for this court's jurisdiction under Article V, Section 3(b)(6)(7) and (8). The decision in the present case cites as controlling authority State v. Baxter, 16 FLW D1561 (Fla. 4th DCA June 12, 1991), which is now pending review in this Court under Baxter v. Letts, **case no 78,294**. Baxter v. Letts is a petition for writ of mandamus seeking to enforce the right of Mr. Baxter, an indigent, to be represented by counsel during the state initiated criminal proceedings to increase Mr. Baxter's sentence from probation to 3 years imprisonment. Petitioner, like Mr. Baxter, requested the District Court to afford him his right to counsel during the state's appeal by requesting rehearing on that ground after the public defender had been appointed to represent him (Appendix - 2-15). That motion **was** denied (Appendix - 16-18). On the authority of Jollie and Brown, supra, since petitioner's case was decided on Baxter which is pending review here on an identical issue, this Court likewise has jurisdiction to review the district court's decision to increase petitioner's sentence without providing petitioner, an indigent, with court appointed counsel and without a valid waiver of record.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Mr. Baumgardner respectfully requests this Court to accept jurisdiction in his case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Jacqueline Barakat, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 1st day of October, 1991.

Margaret Good
MARGARET GOOD

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