047 w/app

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IN THE SUPREME COURT OF FLORIDA

TODD RUSSELL BAUMGARDNER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Case No. 78,689

PETITIONER'S BRIEF ON THE MERITS

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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 Todd Russell Baumgardner was charged by Information filed November 22, 1989, with purchase of cocaine at or near a school (R-23). Sections 893.03(1)(a)(1) and 893.13(1)(e), Florida Statutes (1989). On November 20, 1990, petitioner, filed a "Motion to Depart Downward from Presumptive Guideline Sentence and to Avoid the Minimum Sentence and Sentence the Defendant Alternatively Pursuant to Florida Statutes Section 397.12." (R-38-43). That same day, while represented by private counsel, Stephen Schorr, petitioner withdrew his initial plea of not guilty and entered an open plea of guilty to purchase of cocaine at or near a school, subject to three instruments, the acknowledgment of plea and waiver of rights, a sentencing guideline scoresheet and an order of probation (R-6,5-18).

At the change of plea hearing, Mr. Baumgardner, age 24, testified that on the date of the incident, he was buying crack cocaine after work (R-8). Petitioner testified that he did not even know that he was near a school (R-18).

Petitioner was from Denver and came to Florida with his brother-in-law 3 or 4 months before his arrest to work, putting up fence. In Broward County petitioner was introduced to crack; he started "doing it more and more often"... until he "got uncontrollable." (R-6). He spent his entire paycheck on crack (R-6,8), about $200 to $300 a week, during the two months prior to his arrest (R-6,8). In Denver petitioner had been snorting cocaine for about 6 years. Petitioner testified, "I always had a problem with it," but with crack, it was the "worst ever" (R-15). Even though

he was robbed twice trying to buy crack, he still went back every Friday night to try and get some more (R-15). Petitioner had previously been convicted of DUI (R-16).

After petitioner was released from jail on community release, he started counseling with Ed Kallan at the Chemical Dependency Center two times a week (R-9,12). Petitioner had been clean for the past 28 days. Petitioner had not returned to counseling once he got laid off; once petitioner learned his wife was pregnant, he did not even want to do drugs since he knew he was going to be a father (R-9,13). Petitioner felt he had benefited from the CDC program of rehabilitation and agreed to accept drug treatment if he were placed on probation (R-17). He also agreed to a condition of probation not to drink alcohol (R-13). The court told appellant he would have to go through drug programs or rehabilitation on this plea and the petitioner agreed (R-14).

Petitioner had plans to go back to Denver, once this matter was taken care of (R-14) or perhaps if he could get his probation transferred he would return to Denver sooner (R-16-17). All of petitioner's family members, his wife and brother-in-law had returned to Denver; he was the only one left "down here." (R-11).

The court then accepted petitioner's plea, withheld adjudication of guilt, departed from the sentencing guidelines and stayed petitioner's sentence (R-18). The court placed petitioner on probation for "two years under the general and special conditions agreed upon." (R-18). At the bottom of the guideline scoresheet the court wrote these reasons for departure, "Def was an addict at time of offens. 6 yr addict. $200-$300 per wk. Def is amenable to

rehabilitation. F.S. 397.12. Barbera v. State. *See also a typed order this date" (R-48).

The court also entered a written order of departure on November 20, 1990 (R-44-47), which found petitioner to be a drug dependent person who desired treatment, and that there was a reasonable possibility such treatment would be successful. The order stated it felt "strongly that F.S. 397.12 provides a meaningful alternative to prison in this particular case," and ordered that petitioner "be referred to a licensed Department of Health and Rehabilitative Services drug treatment program pursuant to Florida Statutes Section 397.12" (R-46).

At the sentencing hearing the state objected to the court's use of Section 397.12 on the ground that it did not apply to purchase of drugs, only possession of drugs (R-19).

On December 5, 1990, respondent filed its Notice of Appeal but did not serve a copy on petitioner (R-51). Petitioner's private attorney was served with a copy of the Notice. After respondent served its initial brief on petitioner's trial attorney, Mr. Schorr, wrote a letter to the district court on March 20, 1991, stating that he had not been retained to represent petitioner on the state's appeal, that he had informed petitioner when he received the state's notice of appeal but that Mr. Baumgardner did not show up at an arranged appointment to discuss representation in the state's appeal. Further, Mr. Schorr stated that he was now unable to contact Mr. Baumgardner and Baumgardner's landlord said that he moved out of state and left no forwarding address (Appendix-1).

In a decision filed July 3, 1991, noting "no appearance for appellee" the district court reversed petitioner's sentence citing its recent decision in State v. Baxter, 16 F.L.W. D1561 (Fla. 4th DCA June 12, 1991) (also no appearance for appellee Baxter), and the three year mandatory minimum set forth in Section 893.13(1)(e):

> 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 far 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 F.L.W. D1734 (Fla. 4th DCA July 3, 1991) (Appendix-2).

On July 15, 1991, the trial court adjudged petitioner indigent and appointed the Public Defender of the Seventeenth Judicial Circuit to represent petitioner on the state's appeal (Appendix-3). The Public Defender of the Seventeenth Circuit designated the Public Defender of the Fifteenth Judicial Circuit the same day (Appendix-4).

On July 18, petitioner filed his motion for rehearing through newly appointed counsel, asking that the decision be vacated because he was indigent and without counsel during the state's appeal to increase his sentence from probation to 3 years imprisonment. (Appendix-5-13). Petitioner additionally argued the merits of the appeal for the first time, pointing out authority under Section 397.12, Florida Statutes, to support the trial court's decision to suspend petitioner's sentence and impose a term of

probation with drug treatment on petitioner.

On August 21, 1991 in State v. Scates, ***585*** So.2d 385 (Fla. 4th DCA 1991), the Fourth District Court of Appeal certified the identical issue presented in petitioner's case as a question of great public importance to this Court. State v. Scates, supra, (Appendix **14-15**). The certified question 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)**.

Counsel in Scates filed a notice of intent to invoke discretionary jurisdiction of this Court on August 22, **1991**, and Scates is currently pending before this Court (Case No. 78,533).

On September **4**, **1991**, petitioner's rehearing motion was denied, Judge Polen concurring, finding a waiver of appellate counsel was established by appellee's decision to leave the state without taking steps to secure counsel to represent him and dissenting from the court's failure to certify the question involved as it had done recently in State v. Scates, supra (Appendix-**14-15**), Petitioner thereupon noticed his intent to invoke this Court's discretionary jurisdiction to review this cause on September 25, **1991**.

On February 10, **1992**, this Court accepted jurisdiction and ordered briefing by the parties on the merits. This brief on the merits by Petitioner follows.

SUMMARY OF ARGUMENT

Point I: Petitioner's sentence of two years probation must be affirmed. The trial court had full authority and was within its discretionary powers to so sentence petitioner. Mr. Baumgardner meets the criteria for application of Section 397.12, Fla. Stat. Specifically, he falls within the classification as a drug dependent amenable to rehabilitation. The most recent expression of legislative will under Chapter 953 (Laws of Florida) as well as recent case authority gives new force to Section 397.12.

Moreover, there was no language placed in Section 893.13 stating that the mandatory minimum sentence "shall not be suspended, deferred or withheld," nor was there any language placed in the statute precluding the trial court from staying, suspending, or withholding the mandatory sentence for purchasing cocaine within 1000 feet of a school. In fact, there is no statutory language restricting the trial court's discretion in this regard. Furthermore, application of the three year mandatory minimum to Mr. Baumgardner would be cruel punishment and unconstitutional under the Florida Constitution's guarantee against cruel or unusual punishment.

Point II: The district court's decision in petitioner's case must be vacated under this Court's recent decision in Baxter v. Letts, 17 F.L.W. S98 (Fla. Feb. 6, 1992). Petitioner was entitled to counsel on the state's appeal of his sentence. Nor does the record establish that petitioner waived his right to court-appointed appellate counsel. The record is completely silent as to waiver. The record does not establish that petitioner was ever

advised of his right to court appointed counsel nor anything about the circumstances under which he supposedly left the state, whether with or without his probation officer's permission. Trial counsel's letter to the district court does not establish that petitioner made a valid, voluntary and intelligent waiver of a known right.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DEPARTING DOWNWARD FROM THE THREE YEAR MANDATORY MINIMUM SENTENCE OR IN SENTENCING MR. BAUMGARDNER PURSUANT TO SECTION 397.12, FLORIDA STATUTES.

At sentencing, the trial judge found that Petitioner Baumgardner was a drug addict amenable to rehabilitation pursuant to Section 397.12, Fla. Stat. (1989) (R 44-47,48,19). Following his guilty plea to purchasing cocaine within one thousand feet of a school, Mr. Baumgardner was placed on two years of probation (R-49-50). Section 893.13(1)(e), Fla. Stat. (1989). The trial judge did not abuse his discretion herein for a number of reasons. First, statutory analysis of 893.13(1)(e), Fla. Stat. (1989), demonstrates that imposition of the three year mandatory minimum is not absolutely required. Second, Mr. Baumgardner meets the criteria statutory under Section 397.12 as a drug dependent. The most recent expression of legislative will, via Chapter 953, shows the efficacy of Mr. Baumgardner's original sentence. Third, recent cases have upheld downward departure from the sentencing guidelines where the defendant was, like Mr. Baumgardner, impaired by substance abuse at the time of the crime and, like Mr. Baumgardner, amenable to rehabilitation. Finally, the application of the three year mandatory minimum sentence in petitioner's case would be disproportionate to the offense for which he has been convicted and an unconstitutionally cruel punishment under the Florida Constitution. These points will be addressed sequentially.

This case involves the interplay of Section 397.12, which provides alternatives to incarceration for substance abusers like

petitioner, with Section 893.13(1)(e) which imposes the three year mandatory minimum for purchase of cocaine within one thousand feet of a school.

Comparison of Section 893.13(1)(e), Florida Statutes (1989) with other statutes providing mandatory minimums - a comparison apparently not considered by the Fourth District Court of Appeal in petitioner's case since he and appellee in the lead case of State v. Baxter, 581 So.2d 937 (Fla. 1991) were without appellate counsel (Point 11, infra.) - shows that the three year minimum for selling, purchasing, etc., cocaine within 1,000 feet of a school is not so absolute as the other statutory minimums,, Therefore, Section 893.13(1)(e) should not act as an absolute bar to the application of Section 397.12, Florida Statutes (1989), which the trial judge here applied to avoid the minimum.

Section 893.13(1)(e) did not originally provide for a minimum three year sentence. See Section 893.13(1)(e), Florida Statutes (1987). Subsequently, the statute was amended to include subsection (4), which added an additional assessment up to the amount of the statutory fine to be used for drug abuse programs,. See Section 893.13(4), Florida Statutes (1989). At the same time, subsection (e)1 was amended to include the three year minimum. Section 893.13(1)(e)(1), Florida Statutes (1989). The statute now states that the offender "shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be elisible for parole or statutory gain-time under s. 944.275 Prior to serving such minimum

sentence."[1]

It is clear that the Legislature intended to impose a minimum three year sentence. However, the Legislature failed to include the operative words found in other penal statutes imposing mandatory minimum terms. The other statutes which include mandatory prison terms all require harsh sentences but further foreclose the court's discretionary power by stating specifically that the sentence shall not be suspended, deferred, or withheld. Because Section 893.13(1)(e) does not include this language, it does not take away the discretionary power of the trial court to suspend, defer, or withhold.

Section 893.135, Florida Statutes (1989), the! trafficking statute, requires mandatory minimum sentences when various amounts of controlled substances are possessed, purchased, delivered, etc. It states, "...sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment...." Section 784.08, Florida Statutes (1989), concerning possessian of a firearm in a felony, also states that the mandatory sentence shall not be suspended, deferred, or withheld. By contrast, Section 893.13(1)(e) has been amended since its origin, yet at no time has the Legislature provided for or limited the discretionary authority of the sentencing court to suspend, defer or withhold imposition of the minimum three year sentence.

The Legislature, when enacting penal statutes is presumed to

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[1] The minimum has been amended again in a way not relevant here. See Section 893.13(1)(e)(1), Florida Statutes (Supp. 1990).

be aware of prior existing laws. State v. Dunman, 427 So.2d 166, 168 (Fla. 1983). Furthermore, the restriction included by the Legislature in other mandatory sentence statutes cannot be implied in Section 893.13(1)(e). As stated in St. George Island, Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989):

> Where the legislature uses exact words and different statutory provisions, the court may assume they were intended to mean the same thing.... Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted. [Citations omitted].

Additionally, any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. Rewis v. United States, 401 U.S. 808, 812; 91 S.Ct. 1056, 1059; 28 L.Ed.2d 493 (1971). Otherwise put, penal statutes must be construed strictly and never extended by implication. State v. Jackson, 526 So.2d 58 (Fla. 1988). Therefore, the omission from Section 893.13(1)(e) of any language forbidding the court to withhold, suspend, or defer sentence can only be viewed as a grant of authority to allow such suspension, withholding, or deferment of sentence. Based upon the foregoing alone, Petitioner contends that the trial. judge acted within his discretionary power in imposing a sentence of probation. However, there is an additional basis upon which the original sentence must be upheld.

In this regard, Petitioner disputes the view of the Fourth District in State v. Baxter, 581 So.2d 937 (Fla. 4th DCa 1991) (reversed for no appellate counsel, Baxter v. Letts, 17 F.L.W. S98 (Fla. Feb. 6, 1992). In Baxter v. State, on which petitioner's case was reversed, the district court held that Section 397.011(2),

Fla. Stat. (1989) applies only to simple possession and not to purchase. By adopting this view, the Fourth District narrowly limited the circumstances in which a sentencer can exercise discretion as to render the force and effect of Section 397.011(2) and Chapter **953** of the statutes as well, a nullity. The Fourth District needlessly confines the sentencer's discretion based upon one phrase in subsection **397.011(2)** (emphasis added):

> ...For a violation of any provision of chapter 893, Florida Comprehensive Drug Abuse Prevention and Control Act, relating to possession of any substance regulated thereby, the trial judge, may in his discretion, require the defendant to participate in a drug treatment program...

However, this phrase must be considered in the context of the entire subsection, which defines the Legislature's intent and has no limiting language at all:

> **(2)** It is the intent of the Legislature to provide an alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques :not generally available in state or local prison systems.
>
> * * *
>
> Such required participation may be imposed in addition to or in lieu of any penalty or probation otherwise prescribed by law...

Similarly, the preceding subsection (1) places no limitation on persons dependent on drugs controlled by Chapter 893, of **whom** Petitioner is one. Subsection (1) more fully delineates the Legislature's intent as follows (emphasis added):

> (1) It is the purpose of this chapter to encourage the fullest possible exploration of ways by which the true **facts** concerning drug abuse and dependents may be made known generally and to provide a comprehensive and indiv-

> idualized program for druu dependents in treatment and after care programs. This program is designed to assist in the rehabilitation of persons dependent on the drugs controlled by chapter **893, as** well as other substances with the potential for abuse except those covered by chapter 396. It is further designed to protect society against the social problem of drug abuse and to meet the need of drug dependents for medical, psychological and vocational rehabilitation, while at the same time safeguarding their individual liberties.

Petitioner clearly falls within the ambit of subsection (1).

Furthermore, in Baumgardner and Baxter the Fourth District focused only on the preamble to Chapter 397, apparently overlooking Section **397.12,** under which petitioner was sentenced, and Section 397.10, a further statement of the Legislative intent. These provisions state (emphasis added):

> 397.10 Legislative Intent.-- It is the intent of the Legislature to provide a meaningful alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques and programs not generally available in state or federal prison systems or programs operated by the Department of Health and Rehabilitative Services. It is the further intent of the Legislature to encouraqe trial judqes to use their discretion to refer persons charged with, or convicted of, a violation of laws relatina to druq abuse or a violation of any law committed under the influence of a narcotic druq or medicine to a state-licensed drug rehabilitation program in lieu of, or addition to, imposition of criminal penalties.
>
> 397.12 Reference to Drug Abuse Program.-- When any person, including any juvenile, has been charged with or Convicted of a violation of any provision of chapter **893** or of a violation of any law committed under the influence of a controlled substance, the court...may in its discretion, require the person charged or convicted to participate in a drug treatment program....

Reading all of the statutes in pari materia, it is plain that

the Legislature intended that an offender such as petitioner could, in the trial judge's discretion, be placed in drug treatment rather than prison. Consequently, in limiting the sentencer's discretion exclusively to possessory offenses, the Fourth District in Baxter and Baumgardner overlooked two principles of statutory construction. First,

> "...[i]t is a well settled rule of statutory construction...that a specific statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subsections in general terms..."

Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959) (and cases quoted and cited therein).

Second, where a criminal statute is susceptible of different interpretations, it must be construed in favor of the accused. Lambert v. State, **545** So.2d **838** (Fla. 1989); Weekley v. State, 553 So.2d 239 (Fla. 3d DCA 1989). Applying these principles of statutory analysis to the present facts demonstrate that Mr. Baumgardner's original sentence must be affirmed.

The trial court in its sentencing order found "it is the policy of this State 'to provide meaningful alternatives to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques and programs' not available in the prison system, F.S. 397.12" **(R-45-46).** The trial court found that petitioner was a drug addict who desires treatment and rehabilitation for this addiction and that if his sentence were reduced in order to permit treatment for this dependency, there is a reasonable possibility that such treatment will be successful (R-45-46). The order also finds that petitioner purchased two

cocaine rocks for personal use (from an undercover officer who was selling crack manufactured by the Broward Sheriff's Drug Laboratory, a law enforcement practice now firmly condemned by the Fourth District as a violation of due process of law. Kelly v. State, 17 F.L.W. D154 (Fla. 4th DCA Jan. 3, 1992).

Petitioner established by his testimony that he had a long-standing, 6 year addiction to cocaine and was therefore **eligible** for a downward departure from the guidelines under State v. Herrin, ***568*** So.2d 920 (Fla. 1990). In State v. Herrin, supra, this Court stated that substance abuse, coupled with amenability to rehabilitation, could be considered by the sentencer in mitigation. Under the Herrin criteria, Mr. Baumgardner established his amenability to rehabilitation. This was the finding of the trial court and on the basis of Herrin, petitioner's original sentence must be affirmed.

Finally, petitioner contends that imposition of the three year mandatory minimum sentence would, if imposed on remand, constitute cruel punishment wholly disproportionate to the severity of the offense in violation of the Florida Constitution's prohibition against cruel **or** unusual punishment. Article 1, Section 17, Florida Constitution. Unlike the federal constitution which prohibits cruel **and** unusual punishment, the Florida Constitution uses "or" which indicates that alternatives were intended. Tillman v. State, 16 F.L.W. 674 (Fla. Oct. 17, 1991), at footnote 2. Petitioner contends that a sentence which is disproportionately severe is a cruel sentence in violation of the Florida Constitution and that this disproportionality argument can be **made** under the

Florida Constitution.

The sentencing guidelines call for a range of three-and-one-half (3½) to four-and-one-half (4½) years in state prison for Mr. Baumgardner, a first time felony offender with only a single misdemeanor conviction **(DUI)** for his prior criminal record (R-48). The penalty sharply contrasts to the recommended guidelines range for a first offender convicted of burglary of a dwelling (non-state prison sanction), robbery without a weapon (non-state prison sanction), battery on a law enforcement officer (non-state prison sanction), or lewd and lascivious assault upon a child (non-state prison sanction). Thus, the three year mandatory minimum would constitute cruel and disproportionately severe punishment in Mr. Baumgardner's case. Article I, Section **17**, Florida Constitution.

If this Court does affirm the Fourth District's reversal of petitioner's original sentence, then it must be with leave for petitioner to withdraw his plea, since it was entered on the expectation of the reduced sentence. **Nichols** v. State, 536 So.2d 1052 (Fla. 4th **DCA 1988),** State v. Cooper, 510 So.2d 1252 (Fla. 4th **DCA 1987).**

POINT II

THE DECISION OF THE DISTRICT COURT MUST BE VACATED BECAUSE PETITIONER, AN INDIGENT, WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL ON THE STATE'S APPEAL.

On this state appeal, the district court reversed the petitioner's downward departure sentence of 2 years probation and ordered that his sentence be increased on remand to 3 years imprisonment. State v. Baumgardner, supra. During this state appeal, petitioner was indigent and without counsel. However, petitioner has a constitutional right to counsel in the state's appeal to the district court of his sentence. Baxter v. Letts, 17 F.L.W. S98 (Fla. February 6, 1992).

On rehearing petitioner pointed out to the district court that the state's notice of appeal had not been served on petitioner as required by Fla.R.App.P. 9.140(c)(2). The appellate record does not reveal that petitioner was ever informed of his right to court-appointed counsel on the state's appeal as required by Fla.R.Crim. P. 3.111. That rule provides: "Counsel shall be provided to indigent persons in all prosecutions for offenses punishable by imprisonment...including appeals from the conviction thereof." Waiver of counsel on appeal may not be presumed from a silent record. Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967).

Here trial counsel, Mr. Schorr, wrote a letter to the district court informing the court that he was not retained to represent petitioner on the state's appeal. (Appendix-1). The court was thus aware that petitioner/appellee was without counsel but no offer of counsel was ever made to petitioner. Judge Polen, concurring to

the denial of rehearing, found this letter significant enough to establish a waiver of counsel on appeal all by itself. (Appendix-15). This is clearly incorrect.

Trial counsel's letter does not establish a valid waiver because it is not a part of the appellate record. The facts asserted by Mr. Schorr in the letter are not testimony taken under oath at a judicial hearing. The letter is not competent proof of anything except that Mr. Schorr does not represent Mr. Baumgardner before the district court.

Awaiver of counsel must be intelligently and understandingly made during an inquiry on the record. Van Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948). Judge Polen's concurring position to the rehearing denial that petitioner waived his right to counsel on the state's appeal by leaving the state without making arrangements to secure counsel, is constitutionally infirm; presuming waiver from inaction is inconsistent with the constitutional requirement that waiver may not be presumed from a silent record. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Nor does the letter show that petitioner was in any way aware that he had a right to court-appointed counsel on appeal.

The letter does not establish under what circumstances petitioner returned to Colorado, whether with or without his probation officer's permission. Whether petitioner left with permission or not, specifically had no bearing on Judge Polen's concurring opinion, but, yet, Judge Polen then assumes that petitioner knew he had to take action to secure counsel (perhaps request counsel) before leaving the state or lose his right to

counsel on appeal. The right to counsel does not depend on a request for counsel. Swenson v. Bosler, supra. Petitioner cannot have waived counsel by leaving the state (if he did indeed leave the state) when he had not been served with the state's notice of appeal, had no knowledge of his right to counsel on appeal, had not been offered court-appointed counsel and no judicial inquiry into his exercise or waiver of his right to counsel had ever been made.

At the sentencing hearing the state gave no indication that it would appeal the court's sentencing decision; it merely registered an objection (R-19). Had the state made its intentions known at that time, the trial court could have made a proper inquiry and appointed counsel right then. Petitioner had just testified that he had no money to continue drug counseling on his own since he was laid off from his job and his wife was pregnant (R-9,13). In these circumstances, it is unconscionable for the state to proceed with its sentencing appeal without serving petitioner notice and setting a hearing on the intended appellee's right to counsel on appeal. The failure to do so was fatal to this state appeal and the resulting decision of the district court must be vacated. Baxter v. Letts, supra.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Court vacate the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JACQUELINE BARAKAT, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 4th day of MARCH, 1992.

Margaret Good

MARGARET GOOD
Assistant Public Defender

A P P E N D I X

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