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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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	i
AUTHORITIES CITED . . . . .	ii
PRELIMINARY STATEMENT . . . . .	1
STATEMENT OF THE CASE . . . . .	2
STATEMENT OF THE FACTS . . . . .	3
ARGUMENT . . . . .	4

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, <u>FLORIDA STATUT-</u> <u>E</u> S . . . . .	4
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POINT II

THE DECISION OF THE DISTRICT COURT MUST BE VACATED BECAUSE PETITIONER, AN INDIGENT, <b>WAS</b> DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL ON THE STATE'S APPEAL. . . . .	8
CONCLUSION . . . . .	10
CERTIFICATE OF SERVICE . . . . .	10

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Barbera v. State</u> , 505 So.2d 413 (Fla. 1987) . . . . .	6
<u>Baxter v. Letts</u> , 17 F.L.W.S989 (Fla. February 6, 1992) . . . . .	8, 9
<u>Herrin v. State</u> , 568 So.2d 922 (Fla. 1990) . . . . .	4, 6, 7
<u>Jollie v. State</u> , 405 So.2d 418 (Fla. 1981) . . . . .	8
<u>State v. Baxter</u> , 581 So.2d 937 (Fla. 4th DCA 1991) . . . . .	8
<u>State v. Johnson</u> , 573 So.2d 127 (Fla. 4th DCA 1991) . . . . .	4
<u>Vance v. State</u> , 475 So.2d 1363 (Fla. 5th DCA 1985) . . . . .	4
 <u>FLORIDA STATUTES</u>	
Section 397.12 . . . . .	4
Section 893.12(1)(e)(1) . . . . .	4
 <u>OTHER AUTHORITIES</u>	
<u>The Diagnostic and Statistical Manual of Mental Disorders</u> (Third Edition, Revised) . . . . .	5

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

Petitioner will rely on the statement of the case as set forth in his brief on the merits.

STATEMENT OF THE FACTS

Petitioner will rely on the statement of the facts as set forth in his brief on the merits.

## 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.

Respondent argues that Section 397.12 is not an exception to the mandatory minimum required by Section 893.12(1)(e)(1), and even **if** it is, respondent continues, there was insufficient evidence to support the trial court's written reasons for a downward departure. Respondent questions whether petitioner **was** even a substance abuser and states that there is no evidence of his amenability to rehabilitation.

Medical testimony is not necessary to prove that the defendant **suffers** from drug dependency or addiction. State v. Johnson, 573 So.2d 127 (Fla. 4th DCA 1991). Herrin v. State, 568 So.2d 922 (Fla. 1990). Knowledge of drug addiction is becoming common and needs no proof by expert testimony. In Vance v. State, 475 So.2d 1362 (Fla. 5th DCA 1985) the court noted that drug dependency, like a mental problem, **i s** a treatable medical and psychological condition. Petitioner's testimony establishes his history of drug use and abuse, problems associated with 6 years of periodically snorting cocaine in Colorado and upon discovering crack cocaine in Broward County "it was the worst ever." (R-15). For the last 2 months before his arrest, every week he spent his entire paycheck on crack, returning to the drug sellers' neighborhood despite having been robbed twice (R-6,8). If this is not addiction, what is the **state** using for a definition of addiction?

Continued use of a psychoactive substance despite knowledge of having a persistent or recurrent social, psychological or physical problem that is caused or exacerbated by the **use** of the substance is part of the diagnostic criteria for psychoactive substance abuse, which includes cocaine abuse, The Diagnostic and Statistical Manual of Mental Disorders (Third Edition, Revised) (DSM-III-R)p 169,177. Pursuing cocaine so as to return to dangerous neighborhoods to purchase it though robbed on 2 prior occasions and spending one's entire earnings on cocaine for a two month period of time definitely qualifies as a "social" as well as a "physical problem" under this criteria. Another criteria of recurrent use in situations in which use is physically hazardous is also present in petitioner's case due to the danger he continued to face to procure more cocaine rocks.

The criteria for psychoactive substance abuse includes persistence of such symptoms for a least one month. DSM-III-R p.169. Petitioner's binging on cocaine every Friday night had continued for 2 months. A person need not be a daily user to suffer from cocaine dependence or abuse. The DSM-III-R recognizes episodic use as one of the patterns of use pertaining to this disease of addiction. Although petitioner said he had no problem with alcohol, the trial court said he would have to give it **up** during his probationary period as a condition of probation. Respondent faults the trial court for this condition too, as unrelated to petitioner's drug use. But, could the trial judge know more about drug abuse and addiction than the state? Petitioner did have one prior DUI, a social (**legal**) problem associated with



use of a psychoactive substance, alcohol; an associated feature cocaine abuse or dependency is that the user may also abuse or **be** dependent on alcohol. DSM-III-R, p. 178. It would be patently absurd for the court to order petitioner into treatment for cocaine abuse but allow him to continue to use other psychoactive substances, since their use and abuse are dually related.

The trial court did not have to give petitioner a downward departure sentence and give him an opportunity for drug treatment and rehabilitation. In approving the downward departure sentence in Herrin v. State, supra. due to the defendant's substance abuse and amenability to rehabilitation, this Court also noted that trial judges are under no compulsion to provide downward departures when substance abuse is involved. But, neither is it reversible error for a trial court to impose a sentence under Herrin and Barbera v. State, 505 So.2d 413 (Fla. 1987) where appropriate. Here the trial court found the existence of both the petitioner's substance abuse and his amenability to rehabilitation and properly exercised its discretion to impose a sentence below the guidelines recommended range. Herrin

Respondent faults the departure order because, the state claims there was no indication that petitioner was under the influence of alcohol or drugs at the time the crime was committed. However, to establish a valid Herrin-Barbera departure, it is not necessary that the defendant actually be under the influence at the time of the crime. Petitioner's amenability to rehabilitation is shown by his voluntarily seeking drug treatment by going to counseling at the Chemical Dependency Center after his release from

jail (pre-trial or pre-plea).(R-9,12). This is one of the **ways** that Herrin demonstrated **amenability** to rehabilitation to the court's satisfaction. In Herrin the trial court's departure read, in part, "The Defendant is amenable to rehabilitation, as is evidenced **by** his voluntary entry into drug treatment." Herrin at 921.

The trial court's written reason for **downward** departure is well-supported by the petitioner's testimony of his 6 **year** history **of** drug abuse, his voluntarily seeking counseling, and his commitment to undergo **drug** treatment at a licensed Department of Health and Rehabilitative Services Drug Treatment program (R-46). Herrin v. State, supra. The district court's reversal of petitioner's departure **sentence** should be vacated.

## 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.

Most assuredly, this issue was raised before the District Court of Appeal, Fourth District at the first possible moment, on the petitioner/appellee's motion for rehearing. (Petitioner's Appendix to brief on jurisdiction A-2). After the district court's decision in petitioner's case was decided, reflecting "no **ap-**pearance for appellee", the trial court adjudged petitioner indigent and appointed the public defender to represent him. The public defender immediately filed a rehearing motion, pointing out that the petitioner was indigent and without counsel **during** the state appeal of his sentence, and asked the court to vacate its decision for failure to **provide** the appellee with court-appointed counsel

The Fourth District had also reversed another counsel-less, indigent appellee's downward departure sentence under nearly identical circumstances in State v. Baxter, 581 So.2d 937 (Fla. 4th DCA 1991). This Court reversed, holding that *Mr. Baxter* had a constitutional right to counsel in the state's appeal to the district court of his sentence. Baxter v. Letts, 17 F.L.W.S989 (Fla. **February** 6, 1992). In his jurisdictional brief, petitioner identified State v. Baxter, then pending review in this Court, as a basis for this Court's jurisdiction in petitioner's **case** under Jollie v. State, 405 So.2d 418 (Fla, 1981), since State v. Baxter was cited **as** controlling authority in the district court's opinion in petitioner's case.

The denial of petitioner's right to counsel on the state appeal is here based on the court's complete disregard for petitioner's right to counsel, not the concurring opinion, as respondent states. Within its discretion, once this court has jurisdiction of this case it may examine and decide any issue in the case. The right of an indigent to court-appointed counsel during the state's appeal of his sentence is a fundamental right which deserves this Court's protection.

Respondent assumes that petitioner "absconded" from this jurisdiction, and states that the law is well-settled that once petitioner leaves the jurisdiction, he loses his right to appeal. (Respondent brief at 14). Respondent forgets that this was not petitioner's appeal; it is the state's appeal. **Surely**, the respondent is not suggesting that the appeal must be dismissed if the appellee leaves the jurisdiction?


Before the district court could proceed on the state's appeal to increase the petitioner's sentence from probation to 3 years imprisonment, it must afford him his right to counsel or a waiver of that right must **appear** on the record. Here there had been no judicial inquiry or hearing informing petitioner of his right to court appointed counsel on appeal and waiver of that valued right may not be presumed from this silent record. Reversal for a new appeal is required. 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 copy hereof has been furnished to JACQUELINE BARAKAT, ESQ., Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm **Beach**, Florida 33401, by courier this 20<sup>th</sup> day of APRIL, 1992.

  
\_\_\_\_\_  
MARGARET GOOD  
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