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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, in violation of Section 893.13(1)(e), Florida Statutes (1989). Despite the existence of a three year mandatory minimum sentence for that offense, the trial court found Petitioner to be drug dependent, and he was ordered to serve a term of three (3) years probation, on the authority of Section 397.12, Florida Statutes (1989).

On appeal, the Fourth District Court of Appeal reversed this disposition, citing its prior decisions in State v. Baxter, 16 F.L.W. 1561 (Fla. 4th DCA June 21, 1991), (Appendix, at pages 5-6), and State v. Scates, 16 F.L.W. 2203 (Fla. 4th DCA Aug. 21, 1991), (Appendix at 2-4) which held that the three year mandatory minimum set forth in Section 893.13(1)(e) supersedes and precludes the operation of Section 397.12, Florida Statutes (1989); State v. Nordberg, Case No. 91-0580 (October 2, 1991) (Appendix, at page 1).

In State v. Scates, 16 F.L.W. 2203 (Fla. 4th DCA August 21, 1991), the Fourth District Court of Appeal cited State v. Baxter, supra, when it certified the identical issue raised in those cases as a question of great public importance to this Court. State v. Scates, supra, (Appendix, pages 3-4). 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).

Scates is presently pending before this Court in Case No. 78,533.

Petitioner noticed his intent to invoke this Court's discretionary jurisdiction to review this case on October 16, 1991. This jurisdiction brief follows.

**SUMMARY OF ARGUMENT**

The decision in the present case is cited as authority in another decision of the Fourth District Court of Appeal, State v. Scates, 16 F.L.W. 2203 (Fla. 4th DCA August 21, 1991), (Appendix at pages 2-4), which certified to this Court a question of great public importance. 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; Jollie v. State, 405 So.2d 418 (Fla. 1981).

## ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BELOW WHICH HAS BEEN **CITED AS** CONTROLLING AUTHORITY IN A SUBSEQUENT CASE WHICH CERTIFIES THE IDENTICAL ISSUE TO THIS COURT **AS A** QUESTION OF GREAT PUBLIC IMPORTANCE.

Article V, Section 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. In State v. Scates, 16 F.L.W. 2203 (Fla. 4th DCA August 21, 1991), the following question was certified to this Court 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 PROVISIONS OF SECTION 397.12, FLORIDA STATUTES (1989)?

Appendix, at pages 2-4. This Court therefore has jurisdiction to review Scates, which is presently pending in Case No. 78,533.

Scates held that the three year mandatory minimum term required under Section **893.13(1)(e)**, Florida Statutes (1989) upon conviction for purchasing cocaine within 1,000 feet of a school could not be avoided by resort to Section **397.12**, Florida Statutes (1989), which authorizes the trial court to require a defendant to undergo a program of drug rehabilitation rather than incarceration where he is convicted of a violation of the drug abuse laws of this State.

In Scates, the Fourth District Court of Appeal cited State v. Baxter, 16 F.L.W. 1561 (Fla. June 21, 1991), as requiring its

disposition of the appeal. It was State v. Baxter which was the decision cited as controlling in the present case.

In Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court held that, where a district court of appeal per curiam decision cites as controlling authority a decision which is either pending review in or has been reversed by this Court, prima facie express conflict jurisdiction has been demonstrated, allowing this Court to exercise **its** jurisdiction. This Court observed that:

no litigant can guide the district court's selection of the lead case, and that the randomness of the district court's processing would control the party's right of review unless the citation PCA is itself made eligible for review before this Court.

Thus, this Court recognized the inequity arising from "the luck of the draw" in a district court's determination of which among several similar cases it would decide with a written statement of reasoning, on the basis of which a litigant could obtain conflict jurisdiction, and which it would decide by **way** of a per curiam affirmance, ordinarily not reviewable in this Court. In order to avoid such unjust and arbitrary results, this Court determined that it could accept for review those cases citing to another case pending before it. In State v. Brown, 475 So.2d 1 (Fla. 1985), this Court extended that rule to a situation where the district court had relied for its disposition of a case on another case which certified a question to the Court of great public importance.

This case therefore presents the same equitable concern as that which inspired this Court to accept jurisdiction in Jollie and Brown, supra. Consequently, this Court has jurisdiction to resolve

the issue presented in Petitioner's case, which is exactly the same one presently before this Court in Scates, supra,

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, noting that Petitioner had purchased a minimal amount of cocaine for personal use, that he was impaired at the time, that he suffered from substance abuse, and that he was amendable to and capable of rehabilitation (R 56-87). As a **result** of the decisions in Baxter and Scates, these individuals will be forced to 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. And the numbers of those individuals is far from insignificant. In the Seventeenth Judicial Circuit, a number of trial judges are applying sentencing alternatives, via Chapter 397, to defendants convicted under Section 893.13(1)(e). The issue raised herewith and in Scates is raised in at least ten cases currently pending before the Fourth District Court of Appeal and assigned to attorneys in the office of undersigned counsel.

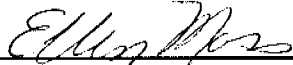
By virtue of the Fourth District's citation to Scates as controlling authority, Petitioner's **case** presents the same issue for review as Scates. Since Scates is now before this Court, jurisdiction of the instant case should be accepted. State v. Brown, supra; Jollie v. State, supra.

**CONCLUSION**

Based on the foregoing arguments and the authorities cited therein, Petitioner 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 2<sup>nd</sup> day of October, 1991.

  
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Counsel for Petitioner