w/APP of 7

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,069

THE STATE OF FLORIDA,

Petitioner,

vs.

SALVADOR F. MUSTELIER

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

****

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Florida Bar No. 0239437
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohdes Building
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

OTHER AUTHORITIES

OTHER AUTHORITIES CONT'D

INTRODUCTION

The Petitioner, the **State** of **Florida,** was the Appellee in the District Court and the prosecution in the trial court. The Respondent, **Salvador F. Mustelier,** was the Appellant in the District Court and the Defendant in the trial court. The parties will be referred to as they stood before the trial court. The symbol "R" will designate the record on appeal; the symbol "**T**" will designate the transcript of proceedings; the symbol "ST" will designate the supplemental transcript; and the symbol "**A**" will designate the Appendix to this brief. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Mustelier was indicted for first degree murder on May 27, **1986** (R.l-2a). On November 5, **1986,** Defendant proceeded to trial (ST.l). During jury selection, the State waived the death penalty and Mustelier, without objection, proceeded to trial with a six person jury.

> MR. BERRY: For the record, I think it was done yesterday in front of Judge Gersten, but we're picking a six-person jury; is that correct?
>
> **MR. WILLIAMS:** Yes.
>
> MR. SCOLA: Has Mr. Mustelier agreed to have six-person jury?

MR. WILLIAMS: Yes.

The State has waived death?

MR. BERRY: Yes.

(ST.3).

The Defendant was convicted of first degree murder and was sentenced to life imprisonment with a twenty-five year minimum mandatory sentence. (R.102, 105, T.501, 505). A motion for new trial was filed but it did not claim that defense counsel's waiver of the twelve person jury was reversible error. (R.110-111).

On direct appeal, Defendant claimed that a valid waiver was not obtained from him thereby vitiating the State's ability to prosecute him for first degree murder with a six person jury. The Third District agreed and reversed the conviction. The Court certified the following question:

> Is a twelve-person jury is required in a first-degree murder case in which the prosecution waives the death penalty?

(A.12).

The Third District then stayed its mandate. This appeal then followed.

QUESTION PRESENTED

IS A TWELVE-PERSON JURY IS REQUIRED IN A FIRST-DEGREE MURDER CASE IN WHICH THE PROSECUTION WAIVES THE DEATH PENALTY.

SUMMARY OF THE ARGUMENT

The State's waiver of the death penalty in the instant case transformed the crime from a capital to a non-capital crime. The reason therefore is that once the death penalty is no longer a possibility, the crime is no longer classified as a capital one. Since the Defendant was no longer facing the death penalty, he was no longer entitled to a twelve person jury inasmuch as a twelve person jury is required to provide a defendant extra protection only when he is facing the death penalty. Therefore, the State's waiver of the death penalty transformed the crime to a non-capital one thereby negating the need for a twelve person jury and the defendant's waiver of the same to allow the trial to proceed with a six person jury.

Brown v. State, 521 So.2d 110 (Fla. 1988), cert. denied, 109 S.Ct. 270 (1988) supports the State's position. Brown holds that once a first degree murder case goes to the factfinder and the factfinder determines that death is not a possible penalty, double jeopardy bars the State from ever seeking the death penalty. This is in accord with the waiver theory since once the State waives the death penalty and the case goes to the factfinder, double jeopardy attaches. Therefore, if a retrial is required, the State is barred from seeking the death penalty. Therefore, it is clear that once the State waives the death penalty, absent any affirmative action by the defendant, the

death sentence, due to double jeopardy, can no longer be sought. Since it can no longer be sought, death is no longer a possible penalty and therefore the crime is no longer capital.

After a waiver of the death penalty, double jeopardy bars the State from ever seeking the death penalty. Since death is no longer a possible penalty it is clear that it is the legislative and judicial intent that certain other consequences of the crime are treated as capital while others are not. In Batie v. State, **534** So.2d **694** (Fla. **1988),** this Court clearly established this principle. In this situation the twelve person jury is provided for only because the jury plays a role in imposing the death sentence. Once this role is removed from the jury, there is no rationale for a twelve person jury. The legislative and judicial intent would be frustrated if the Defendant is provided with safeguards against something he is not faced with, to wit: the death penalty.

Defense counsel's stipulation to waiving the right to a twelve person jury was sufficient to waive such a right. Defense counsel stipulated to the waiver. Since stipulations of counsel are binding on his client, Defendant is not entitled to relief therefrom unless he can show that he was not advised of the ramifications thereof. Since it is presumed that defense counsel advised Defendant of the ramifications of the stipulation, the issue is not proper on direct appeal. Rather,

said claim is only cognizable under a Rule 3.850, ineffective assistance of counsel claim.

ARGUMENT

A TWELVE-PERSON JURY IS NOT REQUIRED IN A FIRST DEGREE MURDER CASE IN WHICH THE PROSECUTION WAIVES THE DEATH PENALTY.

A criminal defendant is not entitled to a twelve-person jury in a state criminal trial as a matter of federal constitutional law. Williams v. Florida, 399 U.S. 78, 86, 90 S.Ct. 1893, 1989 **26** L.Ed.2d **446** (1970). The Florida Constitution Art. I, Sec. 22, provides only that the number of jurors shall not be fewer than six. However, there is a statutory right to a twelve person jury only in capital cases. Sec. 913.10, Florida Statutes (1987).

A capital crime is defined in Rule **3.140** (a)(1) of the Florida Rules of Criminal Procedure as:

> (1) Capital Crimes. An offense which may be punished by death shall be prosecuted by indictment.[1]

The aforementioned constitutional provisions and interpreting rule have established that a capital crime is one where death is a possible penalty and when death is a possible

---

[1] Art. **1,** Sec. 15 (a) Florida Constitution provides that no person shall be tried *for* a capital crime without being indicted by a grand jury.

penalty additional substantive and procedural rights are applied to safeguard the rights of all parties. Adams v. State, 56 Fla. 1, 48 So. 219 (1909); Cotton v. State, 85 Fla. 197, 95 So. 668 (1923); Donaldson v. Sack, 265 So.2d 499 (Fla. 1972); State ex rel. Manucy v. Wadsworth, 293 So.2d 345 (Fla. 1974); Lowe v. Stack, 326 So.2d 1 (Fla. 1974); Reino v. State, 352 So.2d 853 (Fla. 1977).

In Donaldson v. Sack, supra, this Court undertook an analysis of the ramifications of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The specific issue presented concerned the jurisdiction of the circuit courts to try cases charging first degree murder.[2] This Court reaffirmed the holdings of Adams v. State, supra and Cotton v. State, supra, and held that the death penalty must be a possible punishment in order for the offense to be capital. Id. at 502. Accordingly, this Court found that since Furman eliminated capital cases (those in which the death penalty was a possible punishment), the circuit courts did not have jurisdiction in those cases previously delineated as capital.

---

[2] In 1972, jurisdiction for capital felonies vested in the circuit courts, while jurisdiction over all other felonies was in the criminal courts of record. Article V, Sections 6 (3) and 9 (2) Florida Constitution of 1968.

Furthermore, Donaldson considered some of the procedural ramifications flowing from the elimination of capital offenses. It was determined that in the absence of the death penalty, initiation of all criminal proceedings could be by information or indictment, not solely by indictment, and trials for all criminal offenses would be held before a six rather than twelve person jury. Id. at 503-504.

In State ex rel. Manucy v. Wadsworth, supra, this Court was faced with the issue of which statute of limitations was applicable for the first degree murders committed before Furman, but prosecuted after the revival of capital punishment. This Court held that statutes of limitations in criminal prosecutions are vested substantive rights rather than procedural matters. Since they vest at the time of the commission of the offense, the two year statute of limitations for non-capital offenses was inapplicable to capital offenses committed prior to Furman. This Court also held that after the reinstitution of the death penalty, prosecution could only be through indictment. See also Lowe v. Stack, supra (Prosecution occurring by information after reinstitution of death penalty was void).

In Manucy this Court continued to apply both the procedural and substantive attributes of capital crimes based on the nature of the penalty. This analysis of capital crimes continued to be applied, despite its harsh results, in Reino v. State, supra.

In Reino, this Court was presented with the issue of which statute of limitations applied for first degree murders committed during the period capital punishment was abolished but which were prosecuted after its revival. This Court, reaffirmed the holding of Manucy, that statutes of limitations are vested substantive rights which vest at the time of the commission of the offense, and held that first degree murders committed during the period of time when the death penalty was abolished were governed by the two year statute of limitations for non-capital offenses. The State attempted to avoid the harsh result of such a holding, by arguing that the nature of the offense controlled the definition of capital crimes. This analysis was rejected on the ground that capital offenses are those punishable by death. ~~See also~~ Donaldson, supra, 256 So.2d at 502.

Donaldson, Manucy and Reino has established that once the death penalty has been abolished, first degree murder is not a capital crime. By so holding this Court has determined that the nature of the offense does not define a capital crime. Said cases also firmly established that when the death penalty is constitutionally and legislatively authorized, all the extra substantive and procedural rights apply until indictment and the failure to follow proper procedure voids the entire prosecution. The only question left unanswered by this Court is what effect does the State's post indictment waiver of the death penalty

have on determining whether first degree murder is still a capital crime and, if not, whether the continued application of the additional substantive and procedural safeguards is still required.

The Third District's answer to this question is that the State's waiver of the death penalty does not vitiate the need for capital procedural safeguards, since at the time the crime was committed, as a matter of law, death was a possible penalty and therefore these rights vested. The District Court found that this Court's decision in Batie v. State, 534 So.2d 694 (Fla. 1988) mandates this result eventhough the holding in Batie completely contrary to the District Court's analysis. (A.5).

The State submits that the Third District's approach to the problem is overly simplistic and unrealistic. To hold that it is the legislative and judicial intent to continue to provide the Defendant with procedures to insure that the death penalty will be justly imposed eventhough that Defendant no longer faces the death penalty, just because when the crime was committed, as a matter of law, death was a possible punishment is not based on solid reasoning. A post indictment waiver of the death penalty assures to the Defendant that death is no longer possible penalty and that the jury will not have any role in the sentencing procedures. Since the jury is no longer involved, and cannot even on retrial be involved, in sentencing, the

procedural safeguards, including the right to a twelve person jury to insure the just imposition of the death penalty are unnecessary.

The reason that death is not longer a possible penalty is grounded in double jeopardy principles. A criminal defendant is placed in jeopardy when he is put to trial on an indictment or information sufficient in form and substance to sustain a conviction before a court of competent jurisdiction and a jury has been sworn and charged with his deliverance. State v. Iglesias, 374 So.2d 1060 (Fla. 3d DCA 1979). A verdict of guilt to a lower degree of a crime constitutes an acquittal of any higher degree of the crime charged and so bars any subsequent prosecution as to the higher offense. Greene v. City of Gulfport, 103 So.2d 115 (Fla. 1958); McLeod v. State, 128 Fla. 35, 174 So. 466 (1937) (Conviction of murder in the second degree under indictment charging murder in the first degree barred subsequent prosecution for the greater offense and when defendant obtained a new trial, he stood charged with offense of murder in the second degree and lesser degrees of unlawful homicide).

An application of the foregoing principles to the instant situation clearly establishes that under a post indictment waiver of the death penalty by the State, a defendant no longer faces the possibility of the punishment of death. When the

State waives the death penalty and the defendant is convicted of first degree murder and is sentenced to life imprisonment with a twenty-five year minimum mandatory, jeopardy has attached. Therefore, it a retrial is ordered, the highest degree of murder that defendant can be recharged and reprosecuted with, is first degree murder with a life sentence and the attendant twenty-five minimum mandatory term.

This position is supported by Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) and Brown v. State, 521 So.2d 110 (Fla. 1988), cert. denied, 109 S.Ct. 270 (1988). These cases all stand for the proposition that once the sentencer in death penalty cases imposes a life sentence, jeopardy attaches and upon retrial death in no longer a possible penalty.

In Bullington, the defendant was convicted of capital murder. At the statutorily mandated sentencing hearing, the State presented evidence and argued that the death penalty should be imposed. The jury, however, imposed a life sentence. The defendant eventually obtained a new trial and the State once again sought the death penalty. The United States Supreme Court, after concluding that Missouri's capital sentencing procedure resembled a trial on the issue of guilt or innocence, held that the jury's verdict imposing a life sentence was an

acquittal of the death penalty. Therefore, double jeopardy barred the State from seeking the death penalty at the retrial.

In Rumsey, the defendant had been convicted of capital murder, and the state then presented its evidence on the appropriate sentence. The judge, who is the sentencer in Arizona, misinterpreted the law as to one of the aggravating factors and thereby sentenced Rumsey to life. The United States Supreme Court held that the error committed during the course of the defendant's sentencing hearing did not change the character of the court's acquittal of him any more than an error during the guilt phase would have detracted from an acquittal of the substantive charge. The defendant's life sentence was said to be an acquittal on the merits since the matter was determined by the factfinder.

In Brown, this Court was faced with a substantially similar situation as in Rumsey. In Brown, the trial court misinterpreted the law concerning culpability under Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3360, 73 L.Ed.2d 1140 (1982) and ruled, as a matter of law, that said case barred the imposition of the death penalty and entered a life sentence. This Court, agreed with the state that the trial court erred, but refused to remand the case for resentencing. Relying on Rumsey, the Court held, that once the trial court convened the sentencing hearing and imposed a life sentence, jeopardy

attached and the State was forever barred from seeking the death penalty.

Alfonso v. State, 528 So.2d 275 (Fla. 3d DCA 1988) pet. for review denied, 528 So.2d 1183 (Fla. 1988), does not detract from the foregoing double jeopardy analysis. Rather, it is totally consistent with double jeopardy principles. In Alfonso, the trial court, prior to the guilt phase of the trial, ruled that the death penalty was inapplicable. The Third District reversed under the authority of Bloom v. State, 497 So.2d 2 (Fla. 1986), which held that a circuit judge lacks authority to decide pretrial whether to impose the death penalty. In reversing, the court remanded for a new trial with the ability of the State to seek the death penalty. This holding does not run afoul of double jeopardy since a legal sentencing hearing never occurred. The defendants never faced the death penalty because the initial trial was void and therefore the double jeopardy did not preclude the State from seeking the death penalty.[3]

---

[3] Although the State is cognizant of the statement in Alfonso concerning the twelve person jury, it is the State's position that it is mere dicta and has no precential value. Since Alfonso was decided under the authority of Bloom, the language noting that the trial court's decision to waive the death penalty did not transform the crime to a non-capital one thereby not requiring a twelve person jury was not essential to the decision and therefore is dicta. State v. Florida State Improvement Commission, 60 So.2d 747 (Fla. 1952).

In accordance with double jeopardy there is only one situation when the State can seek the death penalty at a second trial. This situation arises when the defendant, after trial has begun but before it is submitted to the trier of fact and without any fault of the State, successfully terminates the trial. The reason double jeopardy is not offended in this situation is that defendant's conduct is deemed a deliberate election on his part to forego his valued right to have his guilt or innocence determined by the first trier of fact. United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1968). State v. Donner, 500 So.2d 532 (Fla. 1987).

When the State waives the death penalty, double jeopardy bars the State from ever seeking the death penalty in that trial, even if a twelve person jury was impaneled. The State's waiver would preclude both parties from initially death qualifying the jury. See Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); O'Connell v. State, 480 So.2d 1184 (1985). Without the ability to determine if any of the jurors would automatically recommend the death sentence, the initial panel would not be qualified to participate in the penalty phase. If the trial is terminated at the State's request, so that the death penalty could be sought at a second trial, jeopardy would bar any retrial at all. State ex rel. Williams v. Grayson, 90 So.2d 710 (Fla. 1956). The State's waiver of the death penalty and proceeding to trial thereon is

the action that invokes jeopardy. Once that occurs, regardless of the number of jurors impaneled, death is no longer a possible penalty.

Inasmuch as double jeopardy does not allow death to be a possible punishment when the State makes a post indictment waiver of the death penalty, the only question that remains is what effect does this have on the "other consequences of th[e] crime." Batie, supra at 694. This question is resolved by looking at the legislative and judicial intent behind each consequence to determine if a particular procedure still applies after the death penalty is no longer a possible punishment.

In Buford v. State, 403 So.2d 943 (Fla. 1981) cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1987), this Court held that a death sentence for committing the crime of sexual battery is so grossly disproportionate and excessive as to be constitutionally prohibited. In Rusaw v. State, 451 So.2d 409 (Fla. 1984), this Court was faced with whether its opinion in Buford removed from the trial court the authority to sentence defendants convicted of sexual battery to life imprisonment with the minimum mandatory twenty-five year provision under section 775.082(1) Florida Statutes, the capital felony sentencing statute. This Court held, in consonance with its previous decision in Donaldson v. Sack, supra at 502, that although a sexual battery could no longer be punished by the death penalty

it was nevertheless, in accordance with legislative intent, to be considered a "capital" crime for purposes of the sentencing provisions of section 775.082(1) Florida Statutes.

In State v. Hogan, 451 So.2d 844 (Fla. 1984) this Court was faced with the identical issue herein, to wit: Where the legislature has defined a crime as capital, but death is not a possible penalty, is a twelve person jury required when a person is tried for capital sexual battery. In finding that a twelve person is jury is not required, this Court analyzed the problem as follows:

> [2] Although we recognize that in doing so we present a chameleon-like appearance, we approve the district court's holding that Hogan could be tried by a jury of six rather than twelve persons. Section 910.13, Florida Statutes (1981), and Rule of Criminal Procedure 3.170 state that twelve persons shall constitute a jury to try all capital cases and that six persons shall constitute a jury to try all other cases. For the purposes of defining "capital" under that statute and rule we hold that a capital case is one where death is a possible penalty. This holding is consistent with Donaldson v. Sack, 265 So.2d 499 (Fla. 1972), in which we wrestled with the correct procedure and forum to be employed in prosecuting first-degree murder cases after the death penalty had been invalidated by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). We held that Furman abolished capital offenses as previously imposed in

> Florida because the traditional definition of a capital cases is one where the punishment is death.
>
> Sexual battery of a child, therefore, while still defined as a "capital" crime by the legislature, is not capital in the sense that a defendant might be put to death. Because the death penalty is no longer possible for crimes charged under subsection 794.011(2), a twelve-person jury is not required when a person is tried under that statute. Our construction of the statute and rule is in accordance with what we believe the legislature intended when it passed the statute, as did we when we enuciated the rule.
>
> Id. at 845-846.

The present situation is identical to that in Hogan. Here the legislature has defined first degree murder as a capital offense. The State, by its post indictment waiver of the death penalty, made the offense non-capital only in the sense that the defendant could not be put to death. Since the death penalty is no longer possible because of said waiver, a twelve person jury in no longer required when a defendant is then tried for first degree murder.

In Rowe v. State, 417 So.2d 981 (Fla. 1982) the defendant was indicted for first degree murder and the State sought the death penalty. After a jury trial with twelve jurors the defendant was convicted as charged and the case went to penalty

phase. After the penalty phase, the trial court imposed life imprisonment with the twenty-five year minimum mandatory term. The defendant appealed and while the appeal was pending she sought bail. She contended that she was entitled to bail because she was not convicted of a capital offense since she did not receive the death penalty. This contention was rejected outright. Instead this Court, by interpreting the legislative and judicial intent, found that a defendant who receives a life sentence with a twenty-five year minimum term has been convicted of a capital crime. Therefore, her conviction was treated as a capital one for consequences other than penalty.

This principle has been reaffirmed in Batie v. State, supra, when this Court held that a defendant convicted of capital sexual battery, was not entitled to bail pending appeal since for this purpose capital sexual battery was a capital crime. This court acknowledged that capital sexual battery is no longer a capital crime since death is no longer a possible punishment. However, it found that if was not bound by this determination when faced with other consequences of the crime. Here it found both the legislative and judicial intent was to deny post-conviction bail to defendants convicted of capital sexual battery. Therefore, this Court found that for the purpose of bail, capital sexual battery, regardless of the punishment, was a capital crime.

In Coleman v. State, 484 So.2d 624 (Fla. 1st DCA 1986), the defendant was convicted of capital sexual battery. On appeal he alleged it was reversible error for the trial court to have refused, pursuant to Rule 3.390(a), Fla.R.Crim.P., to instruct the jury on the penalties since the legislature still defines such crime as a capital one. The Court found no error in refusing to instruct on penalties. The Court based its holding on the finding that "the purpose of the rule is to require a jury instruction when the jury is faced with the choice of either recommending the death penalty or life imprisonment. When the jury is not faced with this choice and plays no role in sentencing, however, it is no longer necessary that the jury be advised of the possible penalties." Id. at 628. See also Croney v. State, 495 So.2d 926 (Fla. 4th DCA 1980); Dailey v. State, 501 So.2d 15 (Fla. 2d DCA 1986); Contra Ortagus v. State, 500 So.2d 1307 (Fla. 1st DCA 1987).

When the State waives the death penalty, the jury plays no role in the sentencing process. Since the jury plays no role in the sentencing, the rules designed to provide extra certainty in imposing the death penalty should not apply. The rules that should no longer apply since the jury is no longer involved in the sentencing process are the right to a twelve person jury, Fla.R.Crim.P. 3.270; the right to ten peremptory challenges, Fla.R.Crim.P. 3.350 (a); the right to have the judge instruct as to penalty, Fla.R.Crim.P. 3.390 (a); the right to have the jury

instructions in writing, Fla.R.Crim.P. 3.390(b); the necessity for the defendant to personally waive instructions on lesser included offenses, Jones v. State, 484 So.2d 577 (Fla. 1980); and, the guarantee of a direct appeal to the Florida Supreme Court, Art. V, Section 3 (b)(1), Florida Constitution. The foregoing rules are all designed to insure the integrity of the imposition of the death penalty by the jury. These rules apply to the jury proper, if not the integrity of the verdict. They only apply when the jury actually is involved in the sentencing process. When the jury is not involved in the sentencing process, such as when the State waives the death penalty and the defendant faces only the capital sentence, with a twenty-five year minimum term, these rules should not apply. To rule otherwise would pervert the process and allow the defendant all the benefits of a capital crime when he is not facing the death penalty and this clearly would run afoul of both the legislative and judicial intent.

This case can also be disposed of on narrower grounds. Initially, the Third District held that defense counsel's stipulation to a six person jury in exchange for the State's waiver of the death penalty, was an insufficient waiver to bind the defendant, after record evidence that the right was knowingly and intelligently waived.

Although the State agrees that the waiver of the twelve trial person jury must be knowingly and intelligently made, it takes issue with the contention that the waiver is invalid if the record does not establish that it was knowingly and intelligently made. The instant situation is closely analogous to the one present in Dumas v. State, 439 So.2d 246 (Fla. 3 DCA 1983) rev. denied, 462 So.2d 1105 (Fla. 1985) wherein it was held that all that was needed to waive trial by jury was a written waiver. A record showing that the waiver was knowingly and intelligently made is not required because,

> ...there is a presumption that in the regular course of the proceedings the defendant, through his attorney, learned of, and waived his constitutional right to jury trial. The presumption which springs from defendant's signature on the formal charging document denoting waiver of jury trial, is more precisely, that the defendant was advised by his attorney of his right to trial by jury, the consequences of relinquishing that right, and any advantages to be expected therefrom all of which makes for the knowing and intelligent waiver required by Patton v. United States, 281 U.S. 276, 50 S.Ct. 253; 74 L.Ed. 854 (1930).
>
> [8, 9] The effect of the presumption is merely procedural, shifting the burden to the accused to produce evidence that the record showing of waiver, and all that it connotes, is untrue. The most important consideration given for the creation of a presumption of law is probability, i.e., that 'proof of

> fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it."
>
> 439 So.2d at 249-250
> Footnotes omitted

Application of the foregoing principles of law to the instant case fosters judicial integrity. In the instant case, defense counsel stipulated to waiving the twelve person jury. The stipulation is no different than the written waiver and therefore the presumption of regularity should be applied.

A stipulation is a voluntary agreement between opposing counsel concerning the disposition of some relevant point. The essence of a stipulation is an agreement between opposing counsel. Arrington v. State, 233 So.2d 634 (Fla. 1970). Stipulations voluntarily entered into between attorneys for the conduct and control of the parties rights during trial will be enforced by courts. Welch v. Gray Moss Bond Holder Corp, 128 Fla. 722, 175 So.2d 529 (1937). Stipulations between defense counsel and a prosecutor must be enforceable if courts are to retain the respect and confidence of the public. James v. State, 305 So.2d 829 (Fla. 1 DCA 1975). A stipulation will not be set aside in the absence of fraud, overreaching, misrepresentation, or withholding of facts rendering it void. City of Miami v. Florida East Coast Railway Company, 428 So.2d 674 (Fla. 3 DCA 1983).

The principles of law concerning stipulations clearly establish that the presumption of regularity is an integral part thereof. Since counsel's stipulations is binding on a defendant and can only set aside based on a showing of fraud overreaching, misrepresentation or withholding of facts, it is presumed that in the regular course of the proceedings that the defendant, through counsel, learned of, and waived his right to have a twelve person jury. The presumption is that defendant was advised by counsel of his right to have a twelve person jury, the consequences of relinquishing that right and any advantages to be expected therefrom including the State's waiver of the death penalty. All of these factors render the stipulation into a knowing and intelligent waiver of the twelve person jury, thereby doing away with the need for a record showing of the same.

Since there is a presumption of regularity, defendant cannot raise this issue on direct appeal. Rather, like Dumas, defendant may seek review of the propriety of the stipulation by a Rule 3.850 Motion, alleging ineffective assistance of counsel for failing to advise of the consequences of the stipulation and thereby making said waiver invalid. This so because it is the Defendant's burden to come forward with evidence to establish that the stipulation was not approved by him. City of Miami v. Florida East Coast Railway Company, supra.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully requests that this Court answer the question in the negative, quash the decision of the Third District and reinstate the judgment of conviction and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Florida Bar No. 0239437
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF **PETITIONER ON THE MERITS** was furnished by mail to **HENRY HARNAGE,** Attorney for Respondent, 1351 N. W. 12th Street, Miami, Florida 33125, on this 8 day of May, 1989.

MICHAEL J. NEIMAND
Assistant Attorney General

/ml