IN THE SUPREME COURT OF FLORIDA

JERRY GILBERT WRIGHT,
Appellant/Petitioner,
vs.
STATE OF FLORIDA,
Appellee/Respondent.

CASE NO. 78,790

DISCRETIONARY REVIEW OF
QUESTION CERTIFIED TO BE OF
GREAT PUBLIC IMPORTANCE BY THE
FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This brief presents two issues. The first issue concerns the following question certified by the Fifth District Court of Appeal to be of great public importance:

> WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.390(a) REQUIRES THAT A TRIAL JUDGE INSTRUCT THE JURY ON THE POSSIBLE PENALTIES THAT ATTEND A CONVICTION FOR FIRST-DEGREE MURDER AT THE CONCLUSION OF THE GUILT PHASE OF THE TRIAL UPON TIMELY REQUEST?

Wright v. State, 16 FLW D2465 (Fla. 5th DCA September 19, 1991).

The second issue deals with the presentation of hearsay evidence over timely objection. This Court is respectfully asked to address the ancillary question so that the error will not be repeated at retrial. See Savoie v. State, 422 So.2d 308, 310 (Fla.1982)("[O]nce we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court.").

STATEMENT OF THE CASE AND FACTS

Robert Clemente was murdered in April of 1981. (R36;47)[1] Approximately a month later Jack McDonald and Peter Ventura were arrested for the murder. (R105-106;206) McDonald was forever discharged due to a violation of Fla.R.Crim.P. 3.191, (Florida's 180 day speedy trial rule). (R116;212) Ventura posted bond and fled. (R701-711) He was later apprehended, tried, convicted and sentenced to death for being the triggerman in Clemente's murder. The conviction and sentence were affirmed in Ventura v. State, 560 So.2d 217 (Fla.1990).

Wright was charged with Clemente's murder six years after the crime. (R1438) The trial court found a violation of Wright's constitutional right to speedy trial and dismissed the charge; that ruling was reversed by the Fifth District Court of Appeal in State v. Wright, 545 So.2d 360 (Fla. 5th DCA 1989). The matter proceeded to a jury trial in the Circuit Court for Volusia County, the Honorable R. Michael Hutcheson presiding, and Wright was found guilty of first degree murder. (R1364;1506) The trial judge followed the jury's recommendation and sentenced Wright to life imprisonment, with no possibility of parole for twenty-five years, with credit to be received for seventeen (17) days time served. (R1618;1623-26) The timely direct appeal of the judgment and sentence to the Fifth District Court of Appeal resulted in certification of the question stated previously in the preliminary statement.

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[1] (R) refers to the record on appeal.

FACTS CONCERNING THE MURDER

On April 15, 1981, a heavy-equipment operator found a man's body in a pickup truck parked at the edge of an orange grove near DeLand, Florida. (R3-12) Volusia County deputies responded and determined that the victim was Robert Clemente. (R367) Clemente had been shot in the back and armpit a total of four times around 3:00 o'clock P.M. on April 15, 1981, and had died soon thereafter. (R36-38;46-52)

Clemente had, for nine months prior to the murder, been a salesman at Crows Bluff Marina; his wife recalled seeing large amounts of money lying around their home and she admitted having previously seen Clemente selling and unloading drugs from a boat at Crows Bluff Marina. (R853-54;884-85) Investigation revealed that, on the day he was killed, Clemente was to meet a man named "Martin" in DeLand and take him to the Crows Bluff Marina to show a boat that was for sale. (R356-57;372-73;845-47)

Prior to working at Crows Bluff Marina, Clemente had managed and attempted to purchase one of Wright's tire stores located in Daytona Beach. (R92-95) As part of a "sweat/equity" franchise sales agreement, Clemente had been insured for $150,000, as were two other people (Frank Bowman and Jack Pladdys) who were also purchasing tire stores from Wright under similar agreements. (R61-64;90) The life insurance policies remained effective until affirmatively terminated because the monthly payments were automatically taken from a checking account. (R64;67-68)

In 1982, Wright provided testimony to a federal grand jury directly implicating McDonald (the person who was arrested with Ventura for Clemente's murder in 1981 and who received a speedy-trial discharge) in a bank scam operation. (R402-04;411) McDonald, who professed that he was soon to die of cancer anyway (R405-407), thereafter pled guilty to federal securities fraud charges, but failed to report to prison to serve his sentences. (R175-177;408;411) He was apprehended in 1987 while trying to arrange a deal whereby he would incriminate Wright in Clemente's murder in exchange for a reduction of his federal sentences. (R117-123) In that regard, McDonald claimed that Wright asked him to procure someone to murder Clemente for a 50-50 split of the insurance proceeds. (R177-181) Other than McDonald's testimony, the State's case against Wright was entirely circumstantial.

Wright and McDonald were social and business friends since 1959, but Wright had refused a request for financial help from McDonald's wife when McDonald was arrested for Clemente's murder. (R173-75; 576-78;982;207-209) Wright testified in his own behalf and denied asking McDonald to get someone to murder Clemente. (R1001) Several people testified that Wright has an exemplary reputation in the Daytona Beach area. (R1068-69;1072-79;1083-89) Wright also presented the testimony of the insurance agent who issued the policy on Clemente's life, and the agent testified that <u>prior</u> to Clemente's murder Wright had asked for the policy to be terminated, but the agent had not yet done so

because he hoped to talk Wright into maintaining the policy. (R790-92) Crows Bluff Marina also had a life insurance policy on Clemente at the time of his death. (R911-914)

FACTS CONCERNING REQUESTED JURY INSTRUCTION

Wright was charged with first degree murder. During voir dire, the topic of the death penalty arose, but the jury was never directly informed that the only sentences available to the Court, should Wright be convicted of first degree murder, were the death penalty or life imprisonment, with no possibility of parole for 25 years. In that regard, the portions of the record where the trial court and/or attorneys discussed the possible penalties in the voir dire and guilt phases of trial are set forth as Appendix A rather than being reproduced in this brief. Relevant portions of the instructions and discussions concerning the possible sanctions and procedures in a capital case are, where pertinent, set for verbatim in Point I.

During the charge conference, the trial judge expressly denied a specific defense request that the court instruct the jury on the maximum and minimum penalties for first degree murder as follows:

> Trial judge: . . . . So, if you want to raise that, I'll be happy to -- you would specifically request penalties -- just strictly first degree?
>
> Defense counsel: Yes.
>
> Trial judge: Okay. So State want to be heard on that one way or the other?
>
> Prosecutor: No.

> Trial judge: Okay. Since the model charge approved by the Florida Supreme Court deletes restating to the jury death and/or live, I will not give it. Obviously, in the penalty phase of course, there's a standard instruction on the penalty phase which re-emphasizes all that.

(R1202).

On direct appeal, the Fifth District Court of Appeal rejected Wright's claim that the trial judge erred in refusing the request for an instruction on the maximum and minimum penalties for first degree murder. The court determined that Fla.R.Crim.P. 3.390(a) only pertains to the penalty phase of a capital trial because, "logically", it is irrelevant until then:

> We can find no Florida appellate decision which deals with a capital case, and the application of amended rule 3.390(a). However, the most logical interpretation of rule 3.390(a) is that the penalty instruction is only required for capital cases, and only in the penalty phase of a capital trial when the jury must recommend the penalty. In the guilt phase of the trial, the jury can be assumed to know the minimum and maximum penalties. [Walsh v. State, 418 So.2d 1000 (Fla.1982)]. But only at the sentencing phase, when the jury is asked to recommend the death sentence or a life sentence is a penalty consideration relevant.

Wright, 16 FLW at 1920, (emphasis in original). On rehearing, the Fifth District Court of Appeal certified as a question of great public importance whether an instruction on the maximum and minimum penalties for first degree murder must be given by the trial judge upon timely request at the conclusion of the guilt

phase of a capital trial. Wright, 16 FLW at 2465. The respective decisions in Wright are appended to this brief as Appendix C.

FACTS CONCERNING THE ANCILLARY QUESTION: IMPROPER PRESENTATION OF IRRELEVANT AND PREJUDICIAL HEARSAY TESTIMONY:

To supposedly rebut testimony of Wright's exemplary reputation for truth and honesty in the community, the State presented the testimony of Mary Williamson. Over timely hearsay objection, Ms. Williamson testified that, based on a promissory note she found in her deceased husband's belongings, Wright owed her husband $24,500 and refused to pay her the money he owed. (R1093-1113) In pertinent part, the testimony went as follows:

> Q: (Prosecutor) State your full name please, ma'am.
>
> A: Mary C. Williamson.
>
> Q: You have a soft voice so why don't you lean towards that mike a little bit.
>
> A: Okay.
>
> Q: Where do you live, ma'am?
>
> A: 140 Gene Francis Lane, Allendale, Florida.
>
> Q: And have you lived in this area most of your life?
>
> A: No. I came to Florida in '66.
>
> Q: Are you currently working, ma'am?
>
> A: No, I'm not.
>
> Q: And what did you do before you retired?
>
> A: Well, I've been a secretary several places.

Q: Were you ever married to a man by the name of John Abbot?

A: Yes, my first deceased husband.

Q: Mr. Abbot is deceased?

A: Yes, late husband.

Q: When did he pass away?

A: June 27, '81.

Q: Now, ma'am, did you ever become aware of any business dealings between your husband, your late husband, and the defendant, Mr. Wright?

A: Yes.

Q: And did you ever come to an understanding that your husband had invested twenty-four thousand, five hundred dollars as a result of his business dealings with Mr. Wright?

Defense Counsel: Your Honor, I would object here because I think this would be hearsay.

Prosecutor: Well, Your Honor, I think that she has documentary proof that she found in her possession.

Trial judge: All right, given that, objection be overruled.

Q: Did you become aware of a twenty-four thousand dollar investment?

A: Yes.

Q: And this was money that was from your husband?

A: Yes.

Q: Okay. Now, do you have personal knowledge before your husband died that he was in the tire business to some extent with Mr. Wright?

A: Yes.

Q: And how did you become aware of the twenty-four thousand, five hundred dollars?

A: After my husband's death, I found this promissory note -- a bona fide promissory note in his possession.

Q: In your late husband's possession?

A: Yes.

Q: And that was to Jerry Wright? Well, it was from Jerry Wright?

A: Yes.

Q: And it was for twenty-four thousand, five hundred dollars?

A: Right.

Q: Now, ma'am, to your knowledge, was the defendant ever able to pay you back any of the twenty-four thousand, five hundred dollars?

A: No.

(R1094-95). For this Court's convenience, Ms. Williamson's complete testimony is set forth as Appendix B.

To summarize, Ms. Williamson next testified that she did not feel that Wright's reputation for truth in the community was very good. (R1096) Ms. Williamson was a member of the same church as Mr. Wright and was aware of the leadership position he held with the church, so she told the reverend that Wright had conducted a bad business deal with her husband. (R1097) When the church members believed Wright and labeled her a trouble maker, she left the church. (R1096-99) On cross-examination, when confronted with a receipt on which she acknowledged having been

paid in full, Ms. Williamson replied that she had never seen the receipt before and that she did not remember signing it; she claimed that her signature had in the past been forged on other documents. (R1099-1104)

On re-direct, the State suggested that perhaps the receipt had been for a different loan, and then established that, because business dealings with Wright had involved mortgages on her property, she had lost everything she had but the house in which she was living. (R1105-07) On re-cross examination, the testimony spiraled into how she lost money litigating her claim, and how she was forced to abandon it because she could no longer afford an attorney and none would take her case on a contingency basis. (R1109-1112) Her testimony concluded with the representation that her husband received less than $1,000 in payment on his $24,500 investment. (R1112-1113)

The prosecutor used Mrs. Williamson's testimony in closing argument as follows:

> Now, Mary Williamson came in here, character witness, the little old lady who got emotionally forced out of the church because she decided that she was not suffering from blind faith. She was going to tell these people, at least look at this man. Mr. Withers tells you that everything she said is not true but the lawyer dismissed that -- well, that's Mr. Withers getting up there. She never got any money, she said. She got the fifteen thousand dollars from Big John[2]. Now, the defense didn't want

[2] "Big John" is a city councilman for the City of Daytona Beach. He owns tire stores in competition with the stores owned by Jerry Wright.

to bring that out until Big John came in here and explained it. All we know is that perhaps her attorney decided I can't pursue it. But, again, the fact of the matter is this woman told you that her knowledge, her community that people she talks to, this man has a bad reputation for truth and veracity.

(R1337)

SUMMARY OF ARGUMENTS

POINT I: The Fifth District Court of Appeal, reasoning that the penalty in a capital case is irrelevant until the jury makes a sentencing recommendation, held that the trial judge did not err in refusing a timely request for an instruction specifying what penalties attend a first degree murder conviction. The appellate court's reasoning understandingly displays a lack of familiarity with the death penalty; the reasoning totally fails to consider that, in voir dire in a capital case, prospective jurors are encouraged by the court and the attorneys to actively discuss his or her attitudes, beliefs and understandings about imposition of capital punishment. In order to do so, it is necessary that the jurors be given an accurate account of the law, and it is necessary that the instruction come from the judge.

During voir dire in a capital trial, the trial court must necessarily accurately inform the jury of the possible penalties that attend a first degree murder conviction so that the attitudes and beliefs of the jurors can be fully and fairly explored on an informed basis. A juror must necessarily know what alternatives are available before he or she can make an intelligent assessment of whether such penalties can be fairly considered and recommended. An instruction on this topic is beneficial, in that it timely admonishes the jurors that any prior discussions concerning those specific penalties are essentially irrelevant to a just determination of guilt, while at the same time the instruction underscores the seriousness of the

jury's task and reminds jurors of the assurances and concerns previously expressed during voir dire.

Though in some cases a trial court's refusal to give such an instruction can be harmless, it was not here. This jury was repeatedly told that, if Wright was found guilty of first degree murder, another hearing would be held whereby the jury would issue a sentencing recommendation which would be given great weight by the judge. However, this jury was never unequivocally informed that only two penalties would be available to choose from if a conviction for first degree murder was returned. When the verdict was returned, these jurors may have believed that they could issue a sentencing recommendation whereby Wright would receive a sentence far less severe than life imprisonment, with no possibility of parole for twenty five years. Thus, though the jury had the option of finding Wright guilty of lesser included offenses (R1506), a verdict of first degree murder may have been returned solely to enable the jury to make an influential sentencing recommendation.

For these reasons, this trial court erred in denying Wright's timely request that the jury be informed by the trial judge of the maximum and minimum penalties that attend a conviction for first degree murder. For due process concerns, it is otherwise necessary that the jury in a capital trial be accurately informed of the maximum and minimum penalties upon timely request by counsel. This conviction should thus be reversed and the matter remanded for retrial.

POINT II: Over timely hearsay objection, the trial judge allowed Ms. Williamson to testify that Wright owed her husband $24,500 and refused to pay now that her husband was dead. Her testimony was not based on her personal knowledge of the business dealings, but instead on a note that she found in her husband's belongings after he died. The refusal of the trial court to sustain Wright's timely objection denied Wright a fair trial and violated Section 90.694, Florida Statutes (1989).

Wright was prejudiced by the ruling because the error enabled the state to unfairly impeach Wright's character with the emotionally compelling testimony of a destitute widow. This trial presented a classic jury question, that is, which of two people is a liar. This jury could reasonably have believed either Wright or McDonald. McDonald, a convicted con man and conniver, had several reasons to lie; Wright did not assist McDonald's wife when McDonald was arrested for Ventura's murder and thereafter Wright testified in federal grand jury proceedings that resulted in McDonald's federal conviction and imprisonment for securities fraud. It seems illogical that Wright would rebuke McDonald's pleas for money and give damning testimony against McDonald after having McDonald get someone to kill Clemente, especially at a time where McDonald was forever discharged from the murder. The State cannot show that this error was harmless, notwithstanding that the Fifth District Court of Appeal apparently so concluded.

POINT I

WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.390(a) REQUIRES THAT A TRIAL JUDGE INSTRUCT THE JURY ON THE POSSIBLE PENALTIES THAT ATTEND A CONVICTION FOR FIRST DEGREE MURDER AT THE CONCLUSION OF THE GUILT PHASE OF THE TRIAL UPON TIMELY REQUEST?

The Fifth District Court of Appeal reasoned that, "logically", Rule 3.390(a) only pertains to the penalty phase of a capital trial because "only at the sentencing phase, when the jury is asked to recommend the death sentence or a life sentence is a penalty consideration relevant." Wright v. State, 16 FLW D1920 (Fla. 5th DCA July 25, 1991) (emphasis added) Wright disagrees, and respectfully submits that the reasoning of the Fifth District Court of Appeal is demonstrably faulty; the topic of the penalties for capital murder is extremely relevant at the very inception of a capital trial. The sanctions that attend a first degree murder conviction are delved into at length in order to select fair and impartial jurors capable of making a reliable sentencing recommendation.

Specifically, when a jury convicts a defendant of first degree murder, a sentencing recommendation must be obtained from the jury pursuant to Section 921.141, Florida Statutes (1989). This makes relevant, during voir dire, issues concerning what specific punishments attend a conviction for first degree murder. Questions must be asked to ascertain the ability of a particular juror to fairly consider the alternative sentences that attend a conviction for first degree murder. As an integral foundation

for those critical questions, the jury necessarily must be told[3] what the possible sentences are so that the prospective jurors can intelligently apprise their own ability to be fair and impartial; to follow the judge's instructions and abide by their oath.

Stated another way, for a venireman to have the ability to intelligently discuss and assess whether he or she could make a fair sentencing recommendation in a particular case, the juror must necessarily be told what the only other alternative to the death sentence is. Fla.R.Crim.P. 3.390(a) does nothing more than authorize the trial judge in a capital case to, when timely requested, correctly instruct the jury on the possible penalties that attend a conviction for first degree murder and to remind them that such considerations, though previously discussed at length before the testimony was presented, are not pertinent to the determination of guilt.

During voir dire, the venire will almost certainly be exposed to extensive discussions concerning the consequences of a guilty verdict for first degree murder. Indeed, that was the very premise on which this Court found that the omission of an instruction on maximum and minimum penalties in a particular case can be harmless error . . . . because the topic is usually so

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[3] See Mellins v. State, 395 So.2d 1207, 1209 (Fla. 4th DCA 1981)("The jury is admonished to take the law from the court's instructions, not from argument of counsel. It must be assumed that this admonition is generally followed."), pet. for rev. denied, 402 So.2d 613 (Fla.1981).

thoroughly exhausted during voir dire, a formal instruction on the maximum and minimum penalties can be superfluous. See Walsh v. State, 418 So.2d 1000, 1003 (Fla.1982)("At voir dire, the court or counsel inquires as to each juror's attitude toward the death penalty and each juror's ability to apply the law which may result in a death sentence.")

Here, however, the court's preliminary instruction and the questioning concerning imposition of the death penalty did not fairly apprise the jury that only two sanctions were possible if the jury convicted Wright of first degree murder. This jury cannot reasonably be assumed to know that the minimum sentence Wright must receive if he was convicted of first degree murder was life imprisonment, with no possibility of parole for twenty five years. Indeed, this jury may well have concluded that it could recommend that Wright be sentenced to a minimal sentence if he was found guilty of first degree murder, and that such a recommendation would be entitled to great weight by the trial judge when Wright was sentenced.

The only portions of this trial where the judge and attorneys in voir dire addressed the penalty phase are set forth in Appendix A. Some specific instances where the topic was discussed are as follows:

> Court: Incidentally, as I indicated, this is a first degree murder case which has the possibility, if there's a conviction of first degree murder, a possibility of a death penalty phase here. We'll cover your thoughts on the death penalty later on so at this point, I'm not asking questions that would get

into your thoughts about the death penalty and the possible imposition of same if the case got that far. That will be covered a little later today.

(R1691)

Court: I need to make a general statement to all of you before I turn the questioning over to the attorneys. Let me read you a little bit. As I indicated to you, the charge here is first degree murder which involves the possibility if there's a conviction as charged to first degree murder, the jury would have to make a recommendation between life and death in a penalty phase.

Now, I'm going to read a little of this to you because somewhere down the line, when the attorneys are talking to you, then they will be asking questions regarding your thoughts about the death penalty and the possible imposition of such if we get into the second phase of a murder case.

All right. I just want to explain a little briefly to you a how a first degree murder case is normally conducted and the possibility of what we refer to as the penalty phase. The trial in this case will occur in two distinct phases -- one is addressed solely to the determination of whether the state has proved beyond and to the exclusion of every reasonable doubt the guilt of the accused.

Should the accused be found guilty of the capital felony charged, a second phase, addressed to what type of penalty the jury will recommend to the court, will be commenced. Although the verdict in the penalty phase during the second phase is advisatory in nature and is not binding upon the court, the jury recommendation is given great weight and is very persuasive when the court determines what punishment is appropriate.

Because your verdict could lead to imposition of the death penalty, your attitude towards the death penalty is a proper subject of inquiry by the court and the attorneys. The fact that you may

have reservations about or conscientious or religious objections to capital punishment does not automatically disqualify you as a juror in a capital case. Of primary importance is whether you can subordinate your personal philosophy to your duty to abide by your oath as a juror and to follow the law as I give it to you.

* * * * * *

At the end of the second phase, should we get to a second phase, as indicated, the first phase would be the guilt phase, and you would have to determine whether or not the defendant is guilty of first degree murder.

If there is a determination of guilty of first degree murder, then we would get to the second phase -- the penalty phase. At the end of the second phase, the jury would render to the court an advisatory opinion as to whether the defendant should be imprisoned for life with no chance of parole for at least twenty five years or whether the defendant should be sentenced to death. As I stated earlier, I would not be bound by your decision but your recommendation would weigh heavily in my determination of an appropriate sentence.

It is during this second phase that we would hear evidence of aggravating and mitigating circumstances. The advisatory opinion, that's the opinion rendered during the second phase, if we get to the second phase, the advisatory verdict need not be unanimous.

The recommendation for imposition of the death penalty must be by a majority of the jury. A recommendation for life with no eligibility for parole for at least twenty five years may be made either by a majority of you or by an even division of the jury; that is, a tie vote of six/six.

(R1741-1745, some portions omitted)

Although the court mentioned that the jury would be able to recommend either the death penalty or life imprisonment with no possibility of parole for twenty five years, the court's instruction fails to unequivocally inform the jurors that only those two options would be available to them if the accused was convicted of first degree murder. In that regard, the prosecutor's voir dire was extremely misleading:

> Prosecutor: Just one or two more questions. Let's assume, if you could for a minute, that we have gone through the fact finding stage, the jury has determined that the defendant is guilty of first degree murder; that we are now in the penalty phase, and you have become convinced that there are more aggravating factors than mitigating factors, and the death penalty is the appropriate recommendation that you should make to the court. Could you come out and one thing we do at the end of the trial is called "polling", and the clerk at the judge's direction will ask each and every juror, "is this your verdict? Do you recommend death?" And you will have to stand up on your own and say; **YES. I'M RECOMMENDING DEATH OR LIFE OR WHATEVER IT MAY BE.**

(R1788) Following a bench conference, the prosecutor "clarified" that misstatement of procedure as follows:

> Prosecutor: Let me clarify. What we do is we have polling at the end of the guilt phase. Each individual juror is polled individually. At the end of the penalty phase, the jurors -- naturally, a count was taken in the back room and then you come out **AND IT'S INDICATED TO THE COURT WHAT YOUR RECOMMENDATION IS -- whether it's six/six, eleven/one, or WHATEVER IT MAY BE, OKAY**. And then the foreman indicates that to the judge and that is that we don't have done the polling ourselves in the jury room **AND**

THIS IS WHAT WE'RE RECOMMENDING. OKAY? AND THAT'S REPORTED TO THE COURT.

(R1789).

The court then stepped in and clarified the process to be that the guilt verdict would have to be unanimous and that the jurors may be polled individually on that verdict. If polled on the penalty phase, the jury would only be polled in a manner to ascertain whether "the jury by a majority rule has recommended either life or recommended death, though we would be asking each juror individually, we would not be asking what your vote was. We'd just be asking each juror individually, 'is that what the jury agreed,' be it six/six, ten/two, **WHATEVER IT MIGHT BE**." (R1790) Significantly, again the court did not unequivocally inform the jury that the only two options would be death or life imprisonment, with no possibility of parole for twenty five years.

It is respectfully submitted that the jury could have understood the foregoing to mean that any recommendation could be issued, so long as a majority of the jury agreed on it. The jury would simply inform the judge what the recommendation was, and that is when the polling might occur. The jury would then be asked individually if that was what was agreed to, "whatever" it might be. To professionals who deal daily with the law in capital cases, it is clear that the judge intended to inform the jury that only two sanctions would be available if a conviction for first degree murder was returned. To a jury comprised of lay people, that information certainly was not clearly set forth.

The entire emphasis of the jury questioning centered on whether a juror would be able to recommend the death penalty; that question was asked repeatedly. The other side of the question was unfortunately left unasked, presumably because no one could reasonably be expected to be unable to vote for life imprisonment, with no possibility of parole for twenty five years, when the only other option is the death penalty. However, the omission of that type question reasonably left the jury under the impression that any recommendation would be able to be made by the jury, a recommendation which the trial judge would give great weight "whatever it might be", so long as it was agreed to by a majority of the jurors.

The instruction on maximum and minimum penalties given at the conclusion of the trial upon request of a party otherwise has the salutary effect of reminding the jurors of all of the concerns that were expressed during voir dire and that the specific penalties for the crime of first degree murder, which during voir dire were also extensively discussed, are not to play a part in their deliberations of guilt or innocence. Just as the jury is told that the information or indictment is not to be considered as evidence of guilt, it is appropriate that the jury be instructed that the specific penalties that were freely discussed earlier in the proceedings are not to be considered.

Certainly, for jurors who have previously been actively encouraged by the trial judge and the attorneys to freely discuss attitudes on their ability to be fair and impartial in the face

of gruesome evidence, emotionally compelling testimony, prolonged recesses and all of the other concerns covered during voir dire in a capital case, an instruction informing the jury just prior to deliberations that the penalties and the concerns previously discussed, probably days before at the beginning of the trial, are not to play a factor in the determination of guilt is not inappropriate. Instead, it would appear to be most prudent.

Death is, indeed, different. Due process considerations under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution require that the jury be correctly and unequivocally informed by the trial judge, as the entity who officially provides the relevant law to the jury, what penalties attend a first degree murder conviction. It is by now beyond doubt that, both procedurally and substantively, the trials and appeals of capital cases are vastly different from the trials of any other criminal matter. Stated in the most general terms, because the matter involves imposition of the death penalty, due process demands the highest degree of procedural rectitude. Just what that general premise means, however, is usually determined on a case by case basis after extensive analysis.

For instance, due process under the Florida Constitution requires that a truly adversarial appeal be taken directly to this Court whenever a trial judge imposes a death sentence. See Klokoc v. State, 16 FLW 603 (Fla. Sept. 5, 1991); Hamblen v. State, 527 So.2d 800 (Fla.1988) In no other case does procedural

due process require that a defendant actively litigate the propriety of a lower court's determination.

The rules of procedure and Florida statutes are replete with procedural requirements which pertain solely to trial of a "capital" felony, that is, a felony in which imposition of the death penalty is a possibility. Rusaw v. State, 451 So.2d 469 (Fla.1984) The prosecution must commence by indictment rather than by information. See Fla.R.Crim.P. 3.140(a)(1) ("An offense which may be punished by death shall be prosecuted by indictment.") The number of jurors is greater in a capital case. Fla.R.Crim.P. 3.270 ("Twelve jurors shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.") Ten peremptory challenges are afforded when a defendant is prosecuted on an offense punishable by death or life imprisonment. Fla.R.Crim.P. 3.350(a)

Rule 3.390(a) states that, except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial. Subsection (b) requires that jury instructions in capital cases be written. Rule 3.780 expressly sets for the procedure to be followed at the sentencing hearing of a capital case. Logically, it seems that placement of language (permitting the court to instruct the jury on the penalty in a capital trial) in a rule that deals with the charge to the jury at the guilt phase, rather than in the rule which pertains to the sentencing hearing, is an indication that the court is indeed authorized to officially

instruct the jury on the possible penalties that may be imposed upon conviction of a capital offense when the jury is charged during the guilt phase just prior to deliberation.

Why is that construction of the rule reasonable? For one thing, the topic of punishment is not relevant in the typical criminal case, but it is in a capital case. Not only is it relevant, it has already been discussed at length at the beginning of trial, probably days before the jury is to retire to deliberate the question of guilt or innocence. It is both prudent and proper that the jury be instructed immediately prior to deliberation that it is not the time for jurors to be thinking about the specific penalties discussed earlier. That said, however, it is also prudent and proper that the court instruct the jury on what the law is so that the jurors can intelligently decide on whether they are able to be fair and impartial in light of the alternatives that are available, and to ensure that no ambiguity exists, as in this case, as to what the consequences are of a guilty verdict of first degree murder.

This consideration is discussed in a slightly different context in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In Beck, the United States Supreme Court held that due process requires that the jury be given, whenever possible, an option of finding a defendant guilty of some crime other than a capital offense. The ruling in Beck recognized that, even though a juror gives an oath, a juror may find himself or herself unable to follow that oath when it comes time to

actually cast a verdict that could result in the death penalty or turning loose a person who, though perhaps not guilty of first degree murder, none-the-less is guilty of some atrocious crime.

In that regard, the state benefits when a guilty verdict is returned upon a lesser offense for the defendant who, though clearly guilty of a serious offense, would otherwise have been acquitted by a jury not thoroughly convinced of the defendant's guilt of the alleged capital offense. Conversely, the defendant benefits from being convicted of a lesser offense when he or she otherwise would have been found guilty of a capital offense by a jury not convinced of guilt of the capital crime but otherwise not willing to totally acquit because it was so clear that the defendant committed some serious crime.

Due process thus requires a "third option" in a capital case, but not in a non-capital case. See Harris v. State, 438 So.2d 787 (Fla.1983) (defendant in capital trial must personally waive jury instruction on lesser included charges of first degree murder); Jones v. State, 484 So.2d 577 (Fla.1986) (defendant in non-capital case not required to waive lesser included offenses). This amply demonstrates that the due process concerns in a capital case override juror assurances that he or she will be able to follow the oath and instructions when faced with choices involving imposition of the death penalty.

These concerns also operate in the context of what sanction will be imposed following a conviction for first degree murder. Going in, a juror must know precisely what alternatives

are available if he or she is to intelligently appraise his or her own ability to make a fair sentencing recommendation. To say that the death penalty can be imposed is misleading if the juror does not know that a sentence of life, with no possibility of parole for twenty five years, is the only other sanction available if a defendant gets convicted of first degree murder.

An instruction by the trial court just prior to the commencement of jury deliberations that the sanctions for first degree murder are either the death penalty or life imprisonment, with no possibility of parole for twenty five years, serves the same purpose as providing jurors alternatives when finding the defendant guilty or not guilty of the capital offense. It accurately informs the jury that, even if a verdict of guilty is returned, an option other than the death penalty will be available to the jury to recommend and the judge to impose. Jurors who, despite best efforts and oaths to the contrary, find themselves thinking about the possibility of the death penalty that will attend a vote for first degree murder, will know that the only alternative to the death penalty is life imprisonment, with no possibility of parole for twenty five years.

This knowledge benefits the state and the defendant. An accurate, full instruction provides the jury with the basis to make informed decisions while at the same time it clarifies any wrong impressions that may have been given the jury during voir dire, the presentation of testimony, or during remarks of the

court and counsel during objections, opening statements or closing arguments made during trial.

Wright was expressly prejudiced here, where the jury may have concluded that if a guilty verdict was returned for first degree murder, a recommendation could be made by them whereby Wright would receive a sentence far less severe than life imprisonment, with no possibility of parole for twenty five years, and that the trial judge would have to give great weight to that recommendation when deciding what sentence to impose. The Fifth District Court of Appeal is not faced with those cases where the death penalty has in fact been imposed, and surely the giving of the penalty instruction[4] upon timely request in a case

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[4] The instruction previously contained in the standard instructions provides as follows:

> I will now inform you of the maximum and minimum possible penalties in this case. The penalty is for the court to decide. You are not responsible for the penalty in any way because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the defendant in accordance with these instructions.
>
> The maximum penalty for the crime of first degree murder is the death penalty. If you find the defendant guilty of first degree murder, I must impose a minimum sentence of life imprisonment, with no possibility of parole for twenty five years.

Fla. Std. Jury Instr. (Crim.) 2.06

where a death sentence is imposed serves the due process concerns set forth in Beck.

That instruction should have been given in this case, and it should be given in each and every capital case when timely requested by one of the parties. This is not to say that the refusal of the trial judge to give the instruction in a particular case cannot ever be harmless error. Rather, Wright respectfully contends that the refusal to give it in this case cannot reasonably be said to have been harmless because this jury may have misunderstood the law and consequences of a guilty verdict. Fairness requires that this conviction be reversed and the matter remanded for retrial.

POINT II

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT THE TESTIMONY OF MARY WILLIAMSON CONCERNING AN ALLEGED $24,500 DEBT THAT WRIGHT OWED MS. WILLIAMSON'S DECEASED HUSBAND, BECAUSE HER TESTIMONY WAS NOT BASED ON PERSONAL KNOWLEDGE BUT INSTEAD ON A PROMISSORY NOTE SHE FOUND IN HER HUSBAND'S BELONGINGS.

Section 90.604, Florida Statutes (1989) provides, "Except as otherwise provided in s.90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness himself." Stated simply, testimony not based on the personal knowledge of the witness who testifies is hearsay, as that term is defined by Section 90.801, Florida Statutes (1989). Under that definition, a "statement" may be either oral or written, and a hearsay statement is one, "other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.801(1)(a)1 & (2), Florida Statutes (1989).

Here, as affirmatively shown by the transcript, Ms. Williamson was not privy to the business dealings between her husband and Jerry Wright. She based her testimony that Wright owed her $24,500 **solely** on a promissory note found in her husband's belongings. The timely objection should have been sustained. See Auletta v. Fried, 388 So.2d 1067, 1068-69 (Fla. 4th DCA 1980)(witness could not base testimony on written estimate of damages to automobile); Hagood v. Willis, 342 So.2d

559, 560 (Fla. 1st DCA 1977)(a survey is inadmissible hearsay when supported solely by testimony of a witness who did not participate in the survey and did not base testimony on field notes of those who did survey.)

In Williams v. State, 510 So.2d 656 (Fla. 2d DCA 1987), hearsay testimony was improperly used to impeach the character of a defendant charged with sexual battery. The testimony presented in Williams was objectionable because it was not based on the personal knowledge of the witness, but instead on what the witness had been told by another person. Williams, 510 So.2d at 656-57. Similarly, Ms. Williamson's testimony is not based on her own personal knowledge, but instead on what she read in a note found in her dead husband's belongings. Ms. Williamson's testimony concerning the contents and the import of the note is classic hearsay.

HARMLESS ERROR ANALYSIS:

Error occurred here, which was timely and specifically objected to. As the beneficiary of error that has been preserved for appellate review, the burden is squarely on the State to show beyond and to the exclusion of every reasonable doubt that the error did not affect the jury verdict. State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

> Thus, if there is error, it requires reversal unless the state can prove beyond a reasonable doubt that the error was harmless. * * * If the state has not presented a prima facie case of harmlessness in its argument, the court need go no further.

Ciccarelli v. State, 531 So.2d 129, 131 (Fla.1988).

To meet its burden of showing that the error was harmless beyond a reasonable doubt, the state argued as follows to the Fifth District Court of Appeal:

> There is no chance that the jury found Wright guilty of first degree murder because he mistreated Williamson. This is akin to references to drug possession during an arrest of a murder suspect. See, e.g., Johnston v. State, 497 So.2d 863 (Fla.1986). This testimony covered only twenty pages, about one per cent of the record. See Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA 1989) Moreover, Williamson testified that she was ostracized by the church members because they disbelieved her and believed Wright was of good character. This was hardly harmful testimony, and certainly did not affect the verdict.

Answer Brief at p.5. It is respectfully submitted that the state failed to demonstrate a prima facie case of harmlessness, and that the District Court of Appeal otherwise failed to conduct a proper harmless error analysis.

The state's argument is based on two cases which are totally dissimilar to the one at issue. The material facts in Johnston are significantly different than those in Wright. Johnston was apprehended at the scene of a murder; he had fresh scratch marks on his face, his clothes were bloody, and he told the police inconsistent stories. Other incriminating evidence included a pendant Johnston was wearing before the murder that was found in the victim's hair after the murder; a shoe print similar to Johnston's was found outside the victim's kitchen window, and; belongings of the victim were found in a pillowcase

at Johnston's place of employment. Johnston, 497 So.2d at 865. The error preserved for appellate review concerned one comment[5] that Johnston had previously "gone to jail for something for two years." Johnston, 497 So.2d at 869.

Those objective facts form an adequate basis from which the jury could conclude beyond a reasonable doubt that Johnston was guilty. Those distinguishing facts aside, the legal analysis performed in Johnston dealt with the trial court's refusal to grant a mistrial after the court sustained an objection and gave a full and complete curative instruction to address one improper comment by a police witness. In Wright's case, however, the timely objection was overruled; there was no curative instruction given. The jury can thus be presumed to have considered this improper testimony when Wright's character and credibility were assessed.

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[5] In Johnston, this Court addressed other claims of error and found them not to have been preserved for appellate review. Thus, no "harmless error" analysis at all was performed as to the alleged errors that were waived. Insofar as the preserved error, the offensive comment arose as follows:

> Q: Okay. At this point in time were you asking Mr. Johnston any questions or were you just listening to what he was saying?
>
> A: I was listening to what Mr. Johnston was telling me.
>
> Q: All right, and did he go on to tell you anything further?
>
> A: Yes, he did. He stated that he was scared because he had already gone to jail for two years for something.

Johnston, 497 So.2d at 868-869.

The state also relies on Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA 1989). Snowden argued that the court erred in determining that the probative value of William's Rule evidence, which Snowden conceded to be relevant, outweighed the prejudicial effect of the testimony. The Third District Court of Appeal noted, "The jury was well and consistently advised about the proper use of the similar fact evidence, thereby minimizing any danger that it might convict the defendant because of uncharged misconduct." Snowden, 537 So.2d at 1390. In the case sub judice, no curative instruction was given by the trial court because the timely and specific objection was overruled. The cases relied on by the state are inapposite here because those cases apply a harmless error analysis in the context of cautionary instructions following a sustained objection. That is not what happened here.

Rather, the appropriate review involves "an examination of the entire record . . . including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." State v. DiGuilio, 491 So.2d at 1135 (emphasis added). Aside from circumstances that are otherwise explainable, See Cox v. State, 555 So.2d 352 (Fla.1989), the "legitimate evidence" that Wright was involved in Clemente's murder comes directly, and solely, from McDonald, a known con man who was aggrieved by Wright and who is now forever free from prosecution for the murder due to his speedy trial discharge.

Even assuming that sufficient independent evidence exists to support a conviction, the nature of the improperly admitted testimony here is such that it likely influenced the jurors when Wright's character was assessed. Ms. Williamson, based on hearsay alone, portrayed Wright as a person who stole money from a her, and that he continues to steal money from this widow despite her dire need for funds. Testimony of other criminal activity is presumptively prejudicial. See Castro v. State, 547 So.2d 111, 115 (Fla.1989)(improper admission of collateral crimes evidence is presumptively harmful.) Testimony of this nature obviously evoked sympathy from the jurors, and they would be hesitant to "suffer from blind faith" as had the members of Wright's church.

Because Wright's credibility was critical, the state cannot show that the improper testimony did not affect the jury's assessment of who was telling the truth, McDonald or Wright. See Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988); Francis v. State, 512 So.2d 280 (Fla. 2d DCA 1987); Ables v. State, 506 So.2d 1150 (Fla. 1st DCA 1987). A reasonable jury could well disregard McDonald's testimony as being retaliation for Wright's refusal to give money to McDonald's wife when McDonald was arrested for murdering Clemente and for thereafter testifying against him, testimony which resulted in McDonald going to prison on federal securities fraud convictions. Among other qualities, McDonald is demonstrably a shrewd con man, having bilked a bank out of hundreds of thousands of dollars.

These facts presented a classic jury question of who is telling the truth, a question which an appellate court properly defers to the jury. Certainly, the introduction of Williamson's testimony over timely objection was error. Because the error was sufficiently preserved for appellate review and because state cannot show that this error did not affect the verdict, the conviction must be reversed and the matter remanded for retrial.

CONCLUSION

The certified question should be answered in the affirmative because an unequivocal instruction by the court to the jury as to what penalties attend a conviction for first degree murder is relevant, prudent and necessary during the guilt phase of a capital trial; Wright's conviction should be reversed and the matter remanded for retrial with directions that Mrs. Williamson's testimony concerning Wright's alleged indebtedness to her be excluded unless a proper predicate is established.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Fl., 32114, in his basket at the Fifth District Court of Appeal and mailed to Jerry Wright, #119313, 3950 Tiger Bay Road, Daytona Beach, Fl., 32114, this 15th day of November, 1991.

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ASSISTANT PUBLIC DEFENDER