IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 83,548

STEPHEN HERNANDEZ

Appellee.
_____/

ON DISCRETIONARY REVIEW OF THE
DECISION OF THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANT

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ISSUE PRESENTED

DOES A TRIAL COURT HAVE THE AUTHORITY TO DISPENSE WITH THE SELECTION OF AN ADVISORY JURY IN THE PENALTY PHASE OF A CAPITAL CASE WITHOUT THE CONSENT OF THE STATE WHEN A DEFENDANT ENTERS A PLEA OF GUILTY, WAIVES AN ADVISORY JURY, AND SPECIFICALLY ACKNOWLEDGES THAT THE TRIAL COURT HAS DISCRETION TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT OR THE DEATH PENALTY.

STATEMENT OF THE CASE AND FACTS

The trial court accepted Stephen Hernandez' waiver of a sentencing proceeding before a jury after he entered a guilty plea in a capital murder case. Hernandez specifically acknowledged that the trial court had the discretion to impose a sentence of life imprisonment or the death penalty (App. F-1). The state asserted that the trial court was without authority to accept the waiver without its consent. The state argued that Florida Rule of Criminal Procedure 3.260 plainly provides that a defendant may waive a jury trial only with the state's consent. The rule states: "Waiver of Jury Trial -- a defendant may in writing waive a jury trial with the consent of the state." Section 921.141(1), Florida Statutes (1991), provides in part that: "(1) Separate Proceedings on Issue of Penalty ..... if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant...." The trial court held that section 921.141(1) applied and that Hernandez could waive a jury in the penalty phase without the state's consent. The trial court reasoned that, because Rule 3.260 appears only under the heading of Chapter IX of the Rules of Criminal Procedure entitled "Trial," it is inapplicable to Chapter XIV proceedings entitled "Sentencing." (App. B).

The Fifth District Court of Appeal agreed (App. F-1). It declined to enter a writ of certiorari requested by the State of Florida. The court noted that Rule 3.260 was adopted in 1968 as Rule 1.260 and it could not have been contemplated that the rule

was also applicable to the sentencing phase of a capital murder case because the legislature did not create the bifurcated procedure of Section 921.141(1) until 1972. Prior to that time the fate of a capital defendant found guilty without a jury rested solely with the court. The district court also noted that Chapter XIV Florida Rule of Criminal Procedure 3.780, entitled "Sentencing Hearing For Capital Cases" specifically refers to and inferentially incorporates section 921.141, without a hint that a conflict existed between any rule of procedure and the statutory provision nor any cross-reference to Rule 3.260. The court further noted that the committee notes specifically indicate that Rule 3.780 was "designed to create a uniform procedure that would be consistent with both Section 921.141, Florida Statutes and State v. Dixon, 283 So. 2d 1 (Fla. 1973), which set forth in detail a practical guide for the conduct of the sentencing hearing (App. F-3). In an opinion filed on January 14, 1994, the court concluded that "if the State is to have the right to impanel an advisory jury in a capital felony case after a defendant has entered an unconditional plea of guilt to a capital crime, the Supreme Court by rule, if the matter is procedural, or the legislature by statute, if the matter is substantive, must provide for that right." (App. F).

The Fifth District Court of Appeal denied rehearing on March 18, 1994, but certified as a question of great public importance whether a trial court has the authority to dispense with the selection of an advisory jury in the penalty phase of a capital case without the consent of the State when a defendant

enters a plea of guilty, waives an advisory jury, and specifically acknowledges that the trial court has discretion to impose a sentence of life imprisonment or the death penalty. (App. H). Timely notice of appeal was filed on April 13, 1994.

SUMMARY OF THE ARGUMENT

The trial court must permit the state to present relevant evidence during the penalty phase of a capital case. The legislature has no authority to create a rule of procedure which conflicts with a rule of procedure adopted by this Court which requires the trial court to employ the assistance of an advisory jury during the penalty phase of a capital case if the state is unwilling to waive its right to that jury.

ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING A CAPITAL DEFENDANT TO WAIVE THE RIGHT TO AN ADVISORY JURY IN THE PENALTY PHASE WITHOUT THE CONSENT OF THE STATE.

The same point of law was involved in the case of State v. Ferguson, 556 So. 2d 462 (Fla. 2d DCA 1990), rev. den., 564 So. 2d 1085 (Fla. 1990), decided by the District Court of Appeal, Second District. In that case the Circuit Court of Lee County convicted the defendant of first degree felony murder following a jury trial. Thereafter, the court concluded that the presentation of evidence to an advisory jury during the penalty phase would be a waste of time, and, over the state's objection discharged the jury and scheduled sentencing for a future date. The State sought a writ of common-law certiorari or prohibition. The Second District Court of Appeal held that the trial court

must permit the State to present relevant evidence during the penalty phase of a capital case, if the state wishes to present such evidence, if death is a legally available penalty. The court also held that the legislature has no authority to create a rule of procedure which conflicts with a rule of procedure adopted by this Court which requires the trial court to employ the assistance of an advisory jury during the penalty phase of a capital case if the State is unwilling to waive its right to that jury. The court specifically found that "assuming that the language of section 921.141 permits the waiver of a jury for the penalty phase after a jury has been employed for the guilt phase, the statutory language cannot override the procedural right given to the State in Florida Rule of Criminal Procedure 3.260." 556 So. 2d at 464. It found that that rule clearly specifies that the defendant can only waive trial by jury "with the consent of the State." It held that the legislature has no authority to create a conflicting rule of procedure in section 921.141, Florida Statutes (1987), because only the Florida Supreme Court has the power to adopt rules of practice and procedure and rules relating to waiver of jury trial are procedural rather than substantive. Id. Unlike the Fifth District, the Second District did not interpret the reference to section 921.141 in Florida Rule of Criminal Procedure 3.780 as a decision by this Court to override rule 3.260 during the penalty phase. Id. Appellant would submit that this result is correct.

Article V, Section 2(a) of the Florida Constitution empowers the Supreme Court of Florida to adopt rules for practice

and procedure in all courts. The supremacy of this Court's rule making power is reflected by the very fact that section 921.141, Florida Statutes (1972) has been engulfed by the Florida Rules of Criminal Procedure 3.780. Section 921.141(1) does not expressly permit waiver of a sentencing jury by a capital defendant without the state's consent but rather is silent as to the circumstances and conditions under which such waiver will be permitted. Such conditions are apparent in pre-existing Florida Rule of Criminal Procedure 3.260.

Florida Rule of Criminal Procedure 3.010 indicates that "These rules shall govern the procedure in *all* criminal proceedings in state courts ..." Rule 3.020 indicates that "These rules are intended to provide for the just determination of *every* criminal proceeding ..." In State v. Garcia, 229 So. 2d 236 (Fla. 1969), this Court found Florida Rule of Criminal Procedure 1.260 to *supercede* a statutory provision disallowing jury waiver in capital cases for by the operation of Rule 1.010, now Rule 3.010, the rules govern *all criminal procedure* in state courts. 229 So. 2d at 239.

Chapter XIV dealing with sentencing cannot be read in a vacuum. Neither that chapter nor Rule 3.780 even provide for a penalty phase jury. The right to a trial by jury in the penalty phase, which is a "trial," arises procedurally by virtue of Florida Rule of Criminal Procedure 3.251, extending the right to trial by jury to *all* criminal prosecutions. If Rule 3.251 of Chapter IX is read in pari materia with Chapter XIV to create the procedural right to a jury trial in the penalty phase then Rule

3.260, which is set out immediately below Rule 3.251 should not be interpreted to apply only to Chapter IX. Section 921.141(1) only provides for the impaneling of a jury after a guilty plea. The right to a jury at all in the penalty phase necessarily arises because of Rule 3.251, which relates to "Trials." Appellant would submit that if the defendant is to have the right to unilaterally waive an advisory jury in the penalty phase in a capital case then this Court by rule or modification of existing rules must provide for the same. The court has not done so since the creation of the bifurcated procedure in 1972. In *dictum* in Williams v. State, 595 So. 2d 936, 938 (Fla. 1992), this Court implied that the trial judge made an erroneous ruling concerning the penalty phase in accepting the defendant's waiver of the advisory jury over the objection of the state. In Sireci v. State, 587 So. 2d 450, 452 (Fla. 1991), this Court found no abuse of discretion in the trial judge's refusal to grant a capital defendant's waiver of a jury sentencing recommendation where the state had objected.

The decision whether or not an individual must die is not one that has traditionally been entrusted to judges. Spaziano v. Florida, 468 U.S. 447, 476 (1984). "The administration of the Florida statute reflects a deeply rooted impulse to legitimate the process through involvement of the jury. That is made evident not only through the use of an advisory jury but also by the fact that the statute has been construed to forbid a trial judge to reject the jury's decision unless he finds that the evidence favoring a sentence of death is so clear and convincing

that virtually no reasonable person could impose a lesser sentence. Thus, the Florida experience actually lends support to the conclusion that American jurisprudence has considered the use of the jury to be important to the fairness and legitimacy of capital punishment." Spaziano, 468 U.S. at 476-477(Justice Stevens, with whom Justice Brennan and Justice Marshall join, concurring in part and dissenting in part). The concurrence in Spaziano v. Florida, supra, found that it is doubtful that judicial sentencing has worked to reduce the level of capital sentencing disparity; if anything, the evidence in override cases suggests that the jury reaches the appropriate result more often than does the judge. Id. 468 U.S. at 477 n.17. In Barclay v. Florida, 463 U.S. 939, 955-56 (1983), the Tedder v. State, 322 So. 2d 908 (Fla. 1975), standard was cited as a factor contributing to individualized sentencing. In Dobbert v. Florida, 432 U.S. 282, 294-95 (1977), Tedder was recognized as a significant procedural safeguard. Even overruling Tedder and its progeny and treating jury recommendations as a advisory only as the legislature intended they be treated calls for the same result in this case as the advisory recommendation is an important red line in the road along with aggravating and mitigating signs in determining what direction a capital case will ultimately take.

As the above history reflects, the voice of the community is even more important in a capital case and no arbitrary distinction should be made making waiver of trial by jury dependent upon the consent of the state and approval of the court

in cases where the stakes are less but forgoing the need for consent of the state in cases where the elimination of disparity is essential. The consent of the state is a valuable tool in ensuring the even application of the death penalty. Moreover, the rules of procedure require the trial court to permit the state to present evidence of an aggravating nature, consistent with the requirements of section 921.141 and so long as death is a legally available penalty, the trial court should permit the state to present relevant evidence during the penalty phase, if the state wishes to present that evidence.

CONCLUSION

Appellant, therefore, requests this Court to grant discretionary review and enter an order quashing the decision of the Fifth District Court of Appeal and answering the certified question in conformity with the sound reasoning of State v. Ferguson, 556 So. 2d 462 (Fla. 2d DCA 1990).

Respectfully submitted,

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IN THE CIRCUIT COURT IN AND
FOR SEMINOLE COUNTY, FLORIDA
EIGHTEENTH JUDICIAL CIRCUIT

CASE NO. G92-1831-CFB

STATE OF FLORIDA,

Plaintiff,

vs.

STEPHEN HERNANDEZ, JR.,

Defendant,

_____/

WAIVER OF ADVISORY SENTENCING JURY
FOR PENALTY PHASE

Comes Now the Defendant, pursuant to Section 921.141(1) Florida Statutes, and waives his right to an advisory sentencing jury in this case.

(1) By this waiver, the defendant understands that he is still exposed to a sentence of life imprisonment or the death penalty after penalty phase proceedings before the judge only.

(2) The defendant further understands that the court will consider evidence in aggravation and mitigation in accordance with Florida law in determining whether he should be sentenced to the death penalty or life imprisonment.

(3) The defendant understands that the court has indicated no preference as to which penalty it will impose, and has made absolutely no commitment to impose one sentence or the other.

(4) The defendant understands that under Florida law he is entitled to an advisory jury sentencing recommendation. He also understands that the sentencing judge under Florida law is required to give great weight to the sentencing recommendation of the advisory jury.

(5) The defendant has thoroughly discussed the matter of waiving the advisory sentencing jury with both of his co-counsel, and believes this waiver is in his best interests and that he is fully informed as to the potential consequences of this waiver.

Stephen Hernandez, Jr.
Defendant

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

vs. **CASE NO. G92-1831-CFB**

STEPHEN HERNANDEZ,

Defendant.
_____/

ORDER ACCEPTING DEFENDANT'S WAIVER OF SENTENCING JURY

THIS CAUSE came on to be heard on Defendant's Motion to Waive a Sentencing Phase Jury pursuant to Section 921.141(1), Florida Statutes, and the Court having heard argument of counsel and being fully advised in the premises, finds as follows:

1. The Defendant entered a plea of no contest as to both counts contained in the Indictment; the Court found a factual basis for said plea and accepted the same.

2. The Court finds that the Defendant filed a waiver of his right to an advisory sentencing by jury, and further finds that such waiver was made freely, knowingly, and voluntarily with a full understanding as to the possible sentencing alternatives available to the Court.

3. A capital offense requires a separate sentencing proceeding pursuant to Section 921.141, Florida Statutes. That statutory section further provides that the sentencing proceeding be conducted before a jury unless waived by the Defendant.

4. The State has objected to the waiver of an advisory sentencing by jury and has

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cited in support of its objection Rule 3.260, Florida Rules of Criminal Procedure, said rule being entitled "Waiver of Jury Trial." That rule provides that a Defendant may waive a jury trial in writing with the consent of the State. The State has further cited Appellate Court decisions in support of its position, said cases being ***Williams v. State,*** 573 So.2d 875 (Fla. 4th DCA 1990); ***Williams v. State,*** 595 So.2d 936 (Fla. 1992); and ***State v. Ferguson,*** 556 So.2d 462 (Fla. 2d DCA 1990).

5. It is the finding of the Court that although there is a conflict between the rule and the statute, the statute which gives the Defendant the right to waive a sentencing jury is being applied in this case. In the cases cited by the State there was a jury trial on the guilt phase and the Defendant attempted to waive the sentencing jury after the finding of guilt. The criminal rule is under Chapter IX of the Rules of Procedure which is entitled "The Trial." It is further the finding of the Court that while the rule does not specifically so state, it contemplates a situation whereby there is a jury trial on the issue of guilt.

6. It is further the finding of the Court that a sentencing jury is advisory only and that the Court has the ultimate decision in deciding whether or not the death penalty should be imposed. The Court will hear all of the aggravating and mitigating circumstances and is bound to apply the same standards that a sentencing jury would apply in its recommendation. The Court further is aware that a sentencing jury proceeding would involve substantial time and expenses for the State of Florida and Seminole County, Florida.

It is therefore

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IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND
FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

M/WAIVE PENALTY PHASE JURY
CASE NO: G92-1831-CFB

STEPHEN HERNANDEZ,

Defendant.

- - - - - - - - - - - - - - - X

BEFORE THE HONORABLE

C. VERNON MIZE, JR.

JUDGE OF THE COURT

Reported by:
CANDACE A. PRINGLE, DOCR
SEMINOLE COUNTY COURTHOUSE
Courtroom D
301 North Park Avenue
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September 9, 1993

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-C-

WHEREUPON:

The following proceedings were had:

* * * * *

THE COURT: All right. Now, I'll hear you briefly in opposition to the waiver of the sentencing jury.

MS. KLEIN: Judge, can I first read this? I just got this right before you walked in.

THE COURT: Sure.

MR. ANDERSEN: Your Honor, since the Defense is proposing a waiver maybe we should argue first.

THE COURT: Well, okay, I was just going to see the State's objection.

MR. ANDERSEN: I guess the cases are going to be the same.

THE COURT: All right.

MR. ANDERSEN: No matter where we are I've already given the Court a copy of the Williams case and the Ferguson case. There's actually two Williams cases, one at the District Court level and another one at the Supreme Court level. Those are cases that have been decided concerning the issue of a waiver of a jury during sentencing phase of a murder trial.

I would ask the Court to note that in each one of those cases there's an indication that a jury sat and found the defendant guilty. I would mention that this pretty much

is a rehash of the same argument I gave in Olson. These cases existed at that time and were cited except for the Court ruling.

The cases if I may cite them are Horace Williams versus State cited at 573 So. 2nd 875, 4th District Court of Appeals opinion at 1990. The same Horace Williams versus State, Supreme Court decision cited at 595 So. 2nd 936, a 1992 decision. And the Ferguson case which is State versus Ferguson at 556 So. 2nd at 462, a 2nd District Court of Appeals opinion.

The reason I would ask the Court initially to note that in both of these cases there's really only two, the Williams case and the Ferguson case, both of these cases there was a jury trial and after the jury found the defendant guilty of murder in the first degree and they were embarking at the sentencing phase of the bifurcated hearing it's only at that time that the Court allowed the defendant to waive the jury at that point in time.

The Ferguson case did not go on to the Supreme Court but the Williams case does, and the Williams Supreme Court case essentially said it doesn't matter what the Judge did, there's no way it can go back for a jury sentencing phase sentence now because of double jeopardy ground.

It never reached the issue of whether or not the Court did the right thing. The closest it got is in the

last paragraph it says as in Brown even though the trial Judge referring to the trial Judge in Williams may have made an erroneous ruling concerning the penalty phase and that's as close as they get. They don't actually decide that he made a bad ruling but they say he may have made.

In either case we believe that Williams and Ferguson don't apply in this situation because they had a jury during the trial phase. There's a rule and there's a statute. The rule is 3.260 which essentially says that the defendant may waive his right to a jury trial with the consent of the State.

THE COURT: With the consent?

MR. ANDERSEN: Right. Back before 1972 it also required the Court's concurrence, but after 1972 it required only the consent of the State. That's the rule now, and as I pointed out in Olson only the rule says jury trials.

Part of my argument is that if the Supreme Court who designs these rules wanted it to include the circumstances of a plea and then a sentencing phase jury they should have said jury proceedings or something that would be inclusive of this bifurcated proceeding.

The statute which the Ferguson case says is contrary but I think they can be construed equally because of the situations involved that statute is 921.141 (1), and it's kind of a long paragraph, but in the middle of it it says if

the jury trial has been waived that's one way obviously that would require the consent of the State, and then it has the word or, and it says if the defendant pleaded guilty then it says the sentencing proceedings shall be conducted before a jury impaneled for that purpose unless waived by the defendant. It doesn't say unless waived by the defendant and the State or with the consent of the State.

THE COURT: It doesn't say discretion of the Court.

MR. ANDERSEN: No, it doesn't. The Ferguson case seems to say that that language is contrary to the rule and the rule wins, but I don't think it's really contrary to the rule because the rule is talking about jury trials. And in both the Ferguson case and the Williams case that's what they had is they had jury trials. They didn't have a plea before them.

The only case that I'm aware of that discusses a ruling on a plea is the Olson case, which I was the attorney on, and this Court was sitting on that case, and that's case G89-384-CFA, a Seminole County Circuit Court case, and that case I would remind the Court that at that time you ruled that the defendant having entered pleas of guilty on two counts of first degree murder may unilaterally with leave of Court, you put with leave of Court, but over the State's objection waive the impaneling of a penalty phase jury.

The third paragraph says that the State -- You made a

ruling also that the State at no time made a waiver and that was in the order that went up to the Supreme Court, and the State appealed that and it was denied, and the Supreme Court case number is 77,382, and I don't have the cite on that and also case number 77,373.

THE COURT: They denied it without any opinion?

MS. KLEIN: Right.

MR. ANDERSEN: Right. They denied it without opinion. The only other information I can offer to the Court besides rational argument is a 1939 case which I wasn't able to get a copy of because of the way the library is set up now, but the key note under --

THE COURT: What's the cite?

MR. ANDERSEN: This is under Rule 3.260. The cite is McCall versus State, 135 Florida 712, 185 Southern Reporter 608. And the key note that's listed here says under capital cases where a statute authorizes acceptance of a plea of guilty of a capital case an accused may waive his constitutional right to trial by jury by plea of guilty and have the evidence submitted to the trial court to determine the degree of punishment to be administered within the statutory limitations.

That's kind of an idea or a concept that existed obviously prior to our bifurcated trial situations. If the Court feels that the statute does not apply but the rule

applies then we've got a problem because the statute is the only thing and there is no rule that sets up the bifurcated process to begin with. The whole penalty phase is designed by statute.

THE COURT: Right.

MR. ANDERSEN: It's not a procedural rule, and I would argue that it's part of the balance of the death penalty process that we've imposed in Florida that includes the right of the defendant to waive a sentencing jury if he pleads guilty, and I don't see how we can ignore that language.

THE COURT: The State does not have to concur for the Court?

MR. ANDERSEN: That's what the statute says and I think that the statute has to be looked at with some reference because it sets up, you know, it sets up the whole procedure for having the sentencing phase jury to begin with.

THE COURT: Okay. All right. Anything else?

MR. ANDERSEN: Let's see, I think I've made all the arguments I had previously mentioned. I feel that this is a substantive right and not a procedural type of thing and therefore the statute should have precedence anyway. That's all I have.

THE COURT: All right. I'll hear from the State now.

MS. KLEIN: Judge, I would argue that this question has been answered in the Williams versus State case at 573 So. 2nd 875, which was the first case. It was a 4th DCA case.

THE COURT: The one he cited?

MS. KLEIN: The cite was 573 So. 2nd.

THE COURT: Same one Mr. Andersen cited?

MS. KLEIN: Right, same one. He also indicated that that case went up to the Florida Supreme Court, and he gave you that cite. But in that particular case it states on page 875 it says the question presented is can the Defense waive trial jury consideration of the penalty phase without the consent of the State and simply have the trial judge conduct the penalty proceedings in their entirety.

What happened in this particular case is that the trial judge said yes and went ahead and said I'm going to sentence him and did that. Well, the State took an appeal and in Williams versus State reported at 595 So. 2nd 936 basically my understanding of what happened is that even though the State had taken an appeal the argument was wait a second jeopardy is already attached. I mean, even though it may have been erroneous what the Judge did, jeopardy has already attached. He's started serving his sentence. There's really nothing we can do about it and that's what happened.

Clearly the Florida Supreme Court in that case stated on page 938, as in Brown, even though the trial judge may have made an erroneous ruling concerning the penalty phase Williams can no longer be put in jeopardy of receiving the death penalty so I think that the question has been answered.

There's also some very drawing language there in State versus Ferguson, and State versus Ferguson which is cited at 556 So. 2nd 462. It's a 2nd DCA case from 1990 and basically the reason why I think this is important is because it gives a lot of the background or at least a higher court's feelings about the whole purpose of even having the jury recommendation.

It states in there on page 463 it indicates in addition to it's obligation to hear and consider the penalty phase evidence the trial court must also employ the assistance of an advisory jury. Okay. It says if the State is unwilling to waive its right to that jury. So let me read that again. In addition to its obligation to hear or consider the penalty phase evidence the trial court must also employee the assistance of an advisory jury if the State is unwilling to waive its right to that jury.

It says here it goes on to state the defendant argues that under section 921.141 the trial court has the discretion to forego an advisory jury at the conclusion of

the guilt phase if the advisory jury is waived by the defendant.

Do you have this case, Judge?

THE COURT: Yeah, I've got it right here.

MS. KLEIN: It goes on to state section 921.141 (1) states if the trial jury has been waived or if the defendant pleaded guilty the sentencing proceedings shall be conducted before a jury and impaneled for that purpose unless waived by the defendant. It was the same argument that the Defense is making in this case. That particular portion it says if the trial jury has been waived or if the defendant pleaded guilty the sentencing proceedings shall be conducted before a jury impaneled for that purpose and unless waived by the defendant.

In this particular case it's stated that the trial jury . . . the trial jury to actually establish guilt or innocence was not waived, that there was a trial. He did not plead guilty. He was found guilty by a jury, and what they were doing was basically waiving the jury with regard to the penalty phase.

When you keep going on down to the next paragraph it says assuming that the language at that section permits the waiver of a jury for the penalty phase after a jury has been employed for the guilt phase the statutory language cannot override the procedural right given to the State.

Florida Rules of Criminal Procedure 3.260 it clearly specifies that the defendant can only waive trial by jury with the consent of the State. The legislature has no authority to create a conflicting rule of procedure, et cetera.

In this particular case there's been a plea entered in this case. The whole entire reason why you have a jury make a recommendation is because it is a big and important decision. You have some -- They don't make the decision on what the sentence would be. The Court still makes that decision. So whatever is decided is not even . . . it's not going to be necessarily what the Court would have to do.

But there is an importance there of having some recommendation by a jury by people out in the community, his peers, as to what the proper punishment should be for the type of crime committed in a capital case. It clearly states that at least both of these cases indicate that the State has the right to object. They have to also agree to the waiver. We're not agreeing to the waiver.

Just like the State may have to agree in cases to allow a no contest plea. The defendant can enter a guilty plea whenever he wants, but he can't come in and enter a no contest plea without consent of the State. He can't just waive a jury trial without consent.

I mean, even though it may be in their opinion some

kind of constitutional right there are constitutional rights that just can't be waived outright without consent by the other side.

It would be the State's position, Judge, that, number one, the fact that they would want to waive any jury recommendation as to the death portion of this case it has to be freely and voluntarily done by them, number one.

If the Court finds that they have freely and voluntarily waived that right the Court must also agree to not have that recommendation, and that even if the Court says, okay, Defense I'm willing to go forward and make the decision without any recommendation from the community then the State or it would be the State's position that the State would still have to agree to that.

But I think it's cut short and I think that at least my understanding from before was that or at least from this Olson case was that the Court in that case I know they've used that and even though there's no opinion that we have to look to we don't know whether or not they said, well, we're not going to entertain this case because of double jeopardy or we're not going to entertain this case because the court agreed with it anyway. We can't use that to rely upon as authority that this is a right that they and only they have.

So it would be the State's position, Judge, based on the case law that we do have, and, you know, when the Court

uses the language an erroneous decision I think they are kind of inferring an opinion. It doesn't say the well reasoned decision of the lower court. It says an erroneous decision.

And the cases that we do have state that even given the same language that they're referring to in the statute that they can't just waive it. It's not just their decision. There's got to be an agreement and that agreement has to be with the Court and also with the State.

THE COURT: Okay. Thank you, Ms. Klein.

Any brief rebuttal?

MR. ANDERSEN: I would just mention that it's not a double jeopardy issue when it went to the Supreme Court because we had continued the sentencing until we got the mandate back.

And to rebut Ms. Klein's argument on Ferguson it says on page 464 in this case the jury was not waived and it says she quoted the assuming language. The assuming language is not of relevance here in this argument because the assuming language is that after the jury may be employed can the Defense on his own waive a sentencing phase jury? Those two points and that's what I was saying is Ferguson and Williams really although they talk about the issue we're dealing with they're not on point because they were trials. They were trials. They weren't pleas. So the only precedence that we

can point to is the Olson case.

THE COURT: All right.

MR. ANDERSEN: We ask the Court to maintain its previous ruling.

THE COURT: I want to reserve ruling on this until our hearing on Monday. We still need to have hearings don't we?

MR. HAFT: It appears we do.

THE COURT: All right. We have them scheduled Monday, but for now I want to take another couple minutes and make sure that this waiver that's been signed in the event the Court allows this has been entered freely and voluntarily.

So just stand in place right there a moment, Mr. Hernandez. You don't have to come back up here. Just stand.

Your attorney now has filed this waiver of advisory sentencing jury penalty phase. That's been signed by you. Well, hand it over there and make sure. Looking at that document there now that was just filed with the Court is that your signature there?

MR. HERNANDEZ: Yes, sir.

THE COURT: All right. And again before this being filed have you discussed it fully with your attorney?

MR. HERNANDEZ: Yes, sir.

THE COURT: I beg your pardon?

MR. HERNANDEZ: Yes, sir.

THE COURT: All right. And I want to make sure you understand now that if the Court accepts this waiver that you would still be exposed to the sentence of life imprisonment or the death penalty after a penalty phase proceeding before the judge.

Do you understand you will still be subjecting yourself to the same sentence, the same possible maximum sentence as if there were a sentencing jury?

MR. HERNANDEZ: Yes, sir.

THE COURT: And further do you understand that if this waiver is allowed then the Court, me as the judge, will consider evidence what we call aggravation and mitigation evidence to determine whether or not you should be sentenced to the death penalty or life imprisonment as to the murder charge.

Do you understand that?

MR. HERNANDEZ: Yes, sir.

THE COURT: And do you further understand that it's the position of this Court that I have not indicated any preference at this stage as to which penalty would be imposed and that I have made no commitment to you or to your attorneys or to the State to impose one sentence or the other.

Do you understand that?

MR. HERNANDEZ: Yes, sir.

THE COURT: And do you further understand that you're entitled to an advisory jury. An advisory jury would be a jury of twelve persons, twelve of your peers, that would hear the aggravating and mitigating circumstance and that that sentencing jury that would hear that would then make a presentation to the Court and the sentencing judge under Florida law is required to give great weight to the recommendation. The Court is not bound by it but the Court is obligated to give great weight to that.

Do you understand that?

MR. HERNANDEZ: Yes, sir.

THE COURT: And so if this waiver is accepted then there would be no sentencing jury. The Court as the judge then would hear argument or will hear evidence and hear arguments by the State and by your attorneys for the Court to determine which sentence would be imposed.

Do you understand that?

MR. HERNANDEZ: Yes, sir.

THE COURT: So with that do you at this time waive your right to have a sentencing hearing jury?

MR. HERNANDEZ: Yes, sir.

THE COURT: Do you want to confer with Mr. Haft?

MR. HERNANDEZ: Yes, sir.

(Whereupon, a brief pause was had.)

THE COURT: You waive your right to a sentencing jury?

MR. HERNANDEZ: Yes, sir.

THE COURT: All right. And again you are doing this freely and voluntarily after having full advice of your attorney?

MR. HERNANDEZ: Yes, sir.

THE COURT: Okay. All right. The Court accepts the waiver for filing and finds that the Defendant is doing it freely and voluntarily and understands what the consequence could be and the Court will reserve ruling and I'm going to try to have an announcement for this on Monday so we can proceed with our planning of whatever course of action will be taken.

So we'll plan to reconvene this proceeding then at three p.m. or shortly thereafter if we're not quite through picking juries on other cases.

MS. KLEIN: Judge, I believe that there is -- I don't know if he was advised of his right to appeal the plea or what have you.

THE COURT: Oh, well, that's okay. All right. I overruled that. You have the right to as announced earlier to appeal the entry of this plea that was accepted earlier. Any appeal would have to be filed in writing within thirty

days. Failure to do that you would waive or give up your right to appeal.

MR. HAFT: I think Ms. Klein is sort of doing what we do at sentencing and just threw it in your direction. I don't think he has a thirty day limit on that now.

THE COURT: That's right. That would not come about until sentencing.

MR. HAFT: I think maybe what she is driving at is as stated in the plea form he gives up his right to appeal the matter up to and including the plea and so forth. Other than those available by collateral attack I think you reviewed.

THE COURT: That was in the form and I covered that.

MS. KLEIN: Right.

THE COURT: He would have the right to appeal really after sentencing.

MS. KLEIN: Well, the thing that would refer to the sentencing or a collateral attack.

THE COURT: Right. That was covered in the form, and on the record. All right. Anything else for the record now?

MR. HAFT: No, sir.

THE COURT: All right. We'll recess this proceeding then until three o'clock Monday. Let's make sure that he's brought back up here Monday afternoon.

(Whereupon, the foregoing proceedings were terminated at 12:45 o'clock p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF SEMINOLE:

I, CANDACE A. PRINGLE, Stenograph Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

Dated this 1st day of October, 1993.

Candace A. Pringle, Court Reporter

STATE OF FLORIDA
COUNTY OF SEMINOLE

The foregoing certificate was acknowledged before me this 1st day of October, 1993, by Candace A. Pringle, who is personally known to me.

NOTARY PUBLIC - STATE OF FLORIDA
My Commission No.
Expires:

E 93-1812

IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

STEPHEN HERNANDEZ,

Respondent.

DCA Case No. 93-2357

Seminole Co. Case No.G92-1831-CFB

RE: ORDER ACCEPTING DEFENDANT'S WAIVER OF SENTENCING JURY

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100, Fla.R.App.P., the State of Florida petitions this Court for a writ of common law certiorari to review a non-final pre-sentencing order entered by a judge of the Circuit Court of the Eighteenth Judicial Circuit. The order to be reviewed is the lower court's September 24, 1993 Order Accepting the Defendant's Waiver of Sentencing Jury [Appendix A] over the State of Florida's objection.

I.

Basis for Invoking Jurisdiction

This Court has jurisdiction to issue a writ of common law certiorari under Article V, Section 4(b)(3) of the Florida Constitution and Rule 9.030, Fla.R.App.P.

The petitioner maintains that there is no adequate remedy by appeal inasmuch as this pre-sentencing order is not specifically enumerated under Sections 924.07, 924.071, Florida Statutes and Rule 9.140, Fla.R.App.P. State vs Pettis, 520 So.2d 250 (Fla. 1988). Therefore, a petition for writ of certiorari is a proper remedy.

-D-

II.

Statement of Facts

1. On September 9, 1993, the defendant entered a plea of nolo contendere to Count I of the indictment charging him with First Degree Premeditated Murder and also entered guilty pleas to two non-capital felonies charged in the same indictment.

2. No sentencing concessions or agreements were contemplated with respect to these pleas and they were entered with the full understanding that the death penalty was continuing to be pursued by the State of Florida.

3. Thereafter, the defendant filed a Waiver of Advisory Sentencing Jury for Penalty Phase [Appendix B] and a hearing regarding this waiver held was before the presiding judge, the Honorable C.Vernon Mize, Jr. (on September 9, 1993). [Transcript on the hearing-Appendix C].

4. The State of Florida specifically did not agree to this waiver [see Appendix C, Page 11-Line 19] and the Court acknowledged that the State indeed did object to it. [Appendix A-paragraph 4].

5. After considering the waiver, along with argument and case law advanced by the parties, the Court agreed with the defendant's desire to dispense with the advisory jury recommendation and entered, on September 24, 1993, an Order Accepting Defendant's Waiver of Sentencing Jury. [Appendix A].

III.

Nature of the Relief Sought

Petitioner seeks an order of this Court quashing the lower

court's Order Accepting Defendant's Waiver of Sentencing Jury and directing the lower court to impanel an advisory jury for the purpose of recommending a sentence as to Count I in the indictment.

IV.

Argument

F.S. 921.141(1), regarding separate proceedings on the issue of penalty in capital cases, provides, *inter alia*, that "...if the defendant pleaded guilty, the sentencing proceedings shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. The defendant has waived the advisory jury and the trial court found the waiver to be a valid one. The State of Florida, however, voiced a timely and unequivocal objection to this waiver.

A waiver of a jury is only valid where the state consents to it. Rule 3.260, Fla.R.Cr.P.; Thomas vs. State, 328 So.2d 545 (D3-1976). The trial court must permit the State to present its penalty evidence to a jury unless the State consents to the waiver of the jury. State vs. Ferguson, 556 So. 2d 462, 464 (D2-1990).

While attempts have been made by the defendant at the hearing and by the trial court in the order from which the state seeks review to distinguish between a defendant waiving a penalty phase jury after a jury verdict and the defendant's waiver of the advisory jury following a guilty or no contest plea, F.S. 921.141(1) does not. The statute does provide for various contingencies in how such a sentencing jury is to be impaneled, however it clearly provides that "[u]pon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as

authorized by s. 775.082." F.S. 921.141(1). There is no language contained within the statute which could allow one to conclude that an advisory jury recommendation, clearly an integral part of our sentencing scheme in capital homicide cases, is any less necessary where a defendant pleads guilty or no contest as opposed to where a jury verdict of guilt has been returned. A jury recommendation under our trifurcated death penalty statute is to be given great weight by the sentencing judge. Tedder vs. State, 322 So.2d 908, 910 (Fla. 1975).

In Williams vs. State, 573 So.2d 875 (D4-1990), the Fourth District Court of Appeal, citing Ferguson *supra*, held that the defense may not waive the sentencing jury without consent of the state, reasoning that Rule 3.260, Fla.R.Cr.P. applies equally to the penalty phase. Williams, 573 So.2d at 876. While the facts in the above-referenced Williams case did involve the defendant's waiver of the jury (for penalty phase purposes) that sat on the guilt phase, it did not appear to be a factor in this court's reasoning.

The defendant in Williams *supra* successfully petitioned the Florida Supreme Court for review and the portion of the district court opinion reversing the imposition of the life sentence earlier imposed by the trial court was quashed, though solely on double jeopardy grounds. Williams vs. State, 595 So.2d 936 (Fla. 1992). In that opinion, the Supreme Court stated, in *dicta*, "...even though the trial judge may have made an erroneous ruling concerning the penalty phase [accepting the defendant's waiver of the advisory jury over the objection of the state], Williams can no longer be put in jeopardy of receiving the death penalty." Williams, 595 So.2d at 938.

Based upon the authority cited above, the trial court, by entering its Order Accepting Defendant's Waiver of Sentencing Jury, departed from the essential requirements of law.

V.

Conclusion

WHEREFORE, based upon the foregoing, this Court should quash the lower court's order and the State of Florida requests that its petition be granted.

I HEREBY CERTIFY that a copy of the foregoing, with the appendix thereto, has been furnished to Gary Andersen, Esquire and Arthur Haft, Esquire at the Office of the Public Defender , Sanford, FL 32771; to the Office of the Public Defender (Appellate Division) 112 Orange Avenue, Suite A, Daytona Beach, FL 32114; to the Office of the Attorney General, Department of Legal Affairs, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 32114; to the Honorable C. Vernon Mize, Jr., Circuit Judge, Seminole County Courthouse, Sanford, FL 32771; with the original and three copies furnished to the Clerk of the Court, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, FL 32114 this 7th day of October, 1993.

THOMAS W. HASTINGS
Assistant State Attorney
Florida Bar No. 356468
100 East First Street
Sanford, FL 32771
(407)322-7534

APPENDIX

APPENDIX A-Order Accepting Defendant's Waiver of Sentencing Jury dated September 24, 1993 (State of Florida vs. Stephen Hernandez-Seminole County Case No. G92-1831-CFB).

APPENDIX B-Defendant's Waiver of Advisory Sentencing Jury for Penalty Phase dated September 9, 1993 (State of Florida vs. Stephen Hernandez-Seminole County Case No. G92-1831-CFB).

APPENDIX C-Transcript of Hearing held on September 9, 1993 before the Honorable C. Vernon Mize, Jr. relating to the defendant's Waiver of Advisory Sentencing Jury for Penalty Phase (State of Florida vs. Stephen Hernandez-Seminole County Case No. G92-1831-CFB).

E
93-1812

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT,
OF THE STATE OF FLORIDA

State of Florida,
Plaintiff/Petitioner,

vs. CASE NO. 93-2357

Stephen Hernandez,
Defendant/Respondent.

DEFENDANT'S RESPONSE TO STATE'S PETITION FOR WRIT OF CERTIORARI

Stephen Hernandez, through the undersigned counsel, responds to the state's petition for writ of certiorari in the above-styled cause as follows:

Certiorari is proper to correct a departure from the essential requirements of law - not to control an exercise of discretion. See, *Cribbs v. State*, 237 So.2d 297 (Fla. 1st DCA 1970). It is clearly discretionary for a trial judge to dispense with a sentencing recommendation from the jury if the defendant knowingly, voluntarily and intelligently waives his entitlement to a jury recommendation. See, *State v. Carr*, 336 So.2d 358, 359 (Fla. 1976) ("Trial judge, upon finding of a voluntary and intelligent waiver, may within his or her discretion either require an advisory jury recommendation, or he may proceed to sentence the defendant without such advisory jury recommendation."). See, *Thompson v. State*, 389 So.2d 197 (Fla. 1980); *Holmes v. State*, 374 So.2d 944 (Fla. 1979); *Lamadline v. State*, 374 So.2d 944 (Fla. 1974).

E

The cases from the Supreme Court of Florida addressing this question consistently and unquestionably hold that a trial court has the discretion to dispense with a jury sentencing recommendation if it is waived by the defendant:

> We come now to the question of the propriety of the sentence of death. There was no jury recommendation because Appellant waived his right to have the jury hear evidence on the question of sentence. One who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, provided the waiver is voluntary and intelligent. ***Upon finding such a waiver, the sentencing court may in his discretion hold a sentencing hearing before a jury and receive a recommendation, or may dispense with that procedure.*** (citations omitted). The record shows that the court inquired into Appellant's waiver and found it to be intelligent and voluntary.

Palmes v. State, 397 So.2d 648, 656 (Fla. 1981) (emphasis added);

In the proceedings below, which are attached as an appendix to the state's petition, reference is made to the case of *State v. The Honorable Vernon C. Mize, Jr. and Joseph Olson*, Florida Supreme Court case numbers 77,373 and 77,382. (hearing of September 9, 1993, p. 6.) In that case, the state petitioned[1] the Supreme Court of Florida to issue a writ of mandamus and/or prohibition in an effort to compel Judge Mize to obtain a jury sentencing recommendation in a capital case. The Florida Supreme Court denied the state's petition. (See Appendix A). Neither mandamus nor prohibition is proper where, as here, an exercise in discretion is involved.

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[1] A copy of the state's petition and the order denying same are appended hereto, and this Court is asked to take judicial notice of these pursuant to Sections 90.202(6) and 90.203, Florida Statutes (1991).

PAGE(s) MISSING

("There is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) ("fact that a capital sentencing is like a trial in the respects significant to the Sixth Amendment's guarantee of a jury trial."); *Provenzano v. State*, 497 So.2d 1177 (Fla. 1986) ("contention that the Sixth Amendment right to a jury trial is violated by Florida's death penalty procedure because a trial court determines the facts anew after the jury issues its recommendation is without merit."); *Lusk v. State*, 446 So.2d 1038 (Fla. 1984) (a violation of double jeopardy does not result when a judge imposes a death sentence following a jury recommendation of life.").

A separate rule of procedure governs the sentencing hearing in a capital case. The rule does not even suggest that a sentencing hearing is an integral part of the trial, for if it is then there are Sixth Amendment implications:

> **RULE 3.780 - SENTENCING HEARING FOR CAPITAL CASES**
> **(a) Evidence.** In all proceedings based on section 921.141, Florida Statutes, the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.
>
> **(b) Rebuttal.** The trial judge shall permit rebuttal testimony.
>
> **(c) Argument.** Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first.

Thus, Fla.R.Crim.P. 3.780 gives the state and the defendant the entitlement to present evidence and to address the

evidence presented by the other side. There is absolutely no entitlement, however, that the evidence be presented to a jury. In Florida, the judge is the sentencer. A jury recommendation is advisory. Section 921.141(1), Florida Statutes (1991) expressly states that after a defendant is convicted of first-degree murder "the court shall conduct a *separate* sentencing proceeding . . . " (emphasis added). The statute further provides:

> If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, ***unless waived by the defendant.***

Section 921.141(1), Florida Statutes (1991).

The state has no entitlement under any statute, rule of procedure, or constitution to require the judge to obtain a jury recommendation where the defendant knowingly and voluntarily waives a jury recommendation after being convicted of first-degree murder. Because the trial court has the discretion to obtain a jury recommendation or not following a defendant's valid waiver of such a recommendation, certiorari is inappropriate because the court's actions do not depart from the essential requirements of law. The state's petition should be denied.

Respectfully submitted,

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLA. BAR # 353973
112-A Orange Avenue
Daytona Beach, Fl. 32114
(904) 252-3367

Attorney for Stephen Hernandez

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 Mr. Gary Andersen, Esq. and Arthur Haft, Esq., Office of the Public Defender, 301 North Park Avenue, Sanford, FL 32771; the Honorable C. Vernon Mize, Jr., Circuit Judge, Seminole County Courthouse, Sanford, FL 32771; and to Thomas W. Hastings, Assistant State Attorney, 100 East First Street, Sanford, FL 32771, this 13th day of October, 1993.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT,
OF THE STATE OF FLORIDA

State of Florida,

Plaintiff/Petitioner,

vs. CASE NO. 93-2357

Stephen Hernandez,

Defendant/Respondent.

APPENDIX A

COPY OF STATE'S
"EMERGENCY PETITION FOR WRIT OF PROHIBITION"
STATE V. HONORABLE C. VERNON MIZE, JR. & JOSEPH PATRICK OLSON, CASE NUMBERS 77,373 & 77,382

ORDER OF THE SUPREME COURT OF FLORIDA
DENYING STATE'S PETITION FOR A MANDAMUS/
PROHIBITION

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner, CASE NO.

vs. CIRCUIT CT. NO. G89-384 CFA

the HONORABLE C. VERNON MIZE, JR.,
JOSEPH PATRICK OLSEN,

Respondent.

_____/

EMERGENCY PETITION FOR WRIT OF PROHIBITION

The state of Florida petitions the court for issuance of a writ of prohibition against the respondent, the Honorable C. Vernon Mize, Jr., and in support thereof states as follows:

I. JURISDICTION:

In this petition the state of Florida seeks to prevent the lower tribunal from exceeding its jurisdiction or usurping jurisdiction with which it is not vested, in that petitioner seeks to prevent the sentencing judge of the circuit court from conducting penalty phase proceedings in a capital case without an advisory jury, without the consent of the state of Florida, upon waiver by the defendant.

The authority for Florida courts to review proceedings by writ is found in Article V of the Florida Constitution. The Supreme Court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction. Art. V, §3(b)(7), Fla. Const.; and Fla.R.App.P. 9.030(a)(3). A writ of prohibition is the appropriate remedy when a trial court

attempts to interfere with the prosecutorial discretion of the state attorney. State v. Bloom, 497 So.2d 2 (Fla. 1986). Pursuant to Fla.R.App.P. 9.030(a)(1)(A)(i), this court is vested with mandatory appellate jurisdiction to review final orders of trial courts imposing death sentences. It is appropriate to invoke the all writs provision before jurisdiction is acquired where the case is within the court's ultimate review jurisdiction. See, Couse v. Canal Authority, 209 So.2d 865 (Fla. 1968); Florida Senate v. Graham, 412 So.2d 360 (Fla. 1982).

This case is one of extreme circumstances, raising important issues having statewide impact, for which no other adequate remedy is available. Two district courts of appeal have determined that the defense cannot waive jury consideration in the penalty phase without the consent of the state and simply have a trial judge conduct the penalty proceedings in their entirety. See, Williams v. State, 15 F.L.W. D2914 (Fla. 4th DCA Dec. 5, 1990); State v. Ferguson, 556 So.2d 462 (Fla. 2nd DCA 1990). The remaining district courts of appeal have not been heard from on this issue. The transcript in the present case would seem to indicate that lack of guidance from the highest court of this state is capable of producing a serious conflict of decision among the lower courts. The Circuit Court in Seminole County Florida is apparently taking a position contrary to that of the district courts and allowing defendants to unilaterally waive an advisory jury without the consent of the state. (App. 7; 11). The Circuit Court in Orange County takes the position that the consent of the state is needed. Such issue is before the

court on direct appeal in Sireci v. State, No. 76,087. Because the imposition of the death penalty requires measured, consistent application, see, Spaziano v. Florida, 468 U.S. 447 (1984); Zant v. Stephens, 462 U.S. 862 (1983), this court should issue a writ of prohibition in the present case, thereby, providing a definitive answer to the lower courts on this issue. Moreover, this court has the power to adopt rules of practice and procedure for Florida courts and is in the best position to determine whether such rules are being properly interpreted in the courts of this state. Art. V, §2(a), Fla. Const. Unless immediate action is taken by this court the case will proceed to the penalty phase and sentence will be imposed without the advice of a jury over the objection of the state.

In the event that an improper remedy is being sought, the state urges this court to treat the petition as though a correct remedy had been sought. See, Caverly v. State, 436 So.2d 191 (Fla. 2d DCA 1983). In an abundance of caution the state has simultaneously filed a notice of appeal in this cause. Should this court determine that jurisdiction more appropriately rests in another court the state respectfully requests that rather than dismiss the petition the court transfer it to the Fifth District Court of Appeal. See, State ex. rel. Soodhalter v. Baker, 248 So.2d 468 (Fla. 1971); Art. V §2(a), Fla. Const.; Fla.R.App.P. 9.040(b).

II. FACTS:

Joseph Patrick Olsen pleaded guilty to two counts of the first degree murder of his parents on December 28, 1990 (App. 3).

Defense counsel asked the court to allow Olsen to waive a sentencing jury in the penalty phase to avoid further stress to his family (App. 3; 8). At that time the state agreed that section 921.141, Florida Statutes (1987), allowed the defendant to unilaterally waive a jury (App. 10). The Assistant State Attorney believed that was the nature of the law based on the statute, as he did not have the benefit of State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990), and Williams v. State, 15 F.L.W. D2914 (Fla. 4th DCA Dec. 5, 1990) (App. 3). A final decision, however, had not been made at that time. The State Attorney, Mr. Wolfinger, wanted to speak with some of the defendant's siblings (App. 4). Mr. Wolfinger is the person who would make the decision. He ultimately decided that empaneling an advisory jury would be the fairest means of proceeding in the penalty phase. Upon being made aware of the two cases, the Assistant State Attorney immediately made a motion to continue the penalty phase on the grounds that a jury cannot be waived without the consent of the state. In the event that his acquiescence at the plea hearing could be construed as a waiver, the Assistant State Attorney formally withdrew such waiver, indicating that his position, however, was that he had not agreed to waive a jury but had merely acknowledged that section 921.141 would seem to allow a defendant to waive a jury in the penalty phase. (App. 5, 10). The sentencing judge considered the state's actions at that time as a waiver and set the penalty phase for February 1, 1991, without an advisory jury (App. 11). The defendant filed a formal waiver of his right to sentencing by a jury on January 24, 1991 (App. 25).

The state subsequently filed a motion to continue sentencing, objecting to the sentence being imposed without a penalty phase presentation and resulting recommendation (App. 2-3). A hearing was had on the motion on January 25, 1991. The defense argued that Williams and Ferguson were not applicable since both of those cases involved jury trials in which the jury was dismissed for sentencing purposes; the state consented to the waiver; a withdrawal of consent would prejudice the defendant as his two sisters and brother-in-law are undergoing tremendous stress; the family of the victims should be considered; and the defendant may unilaterally waive a jury pursuant to section 921.141, which prevails over Florida Rule of Criminal Procedure 3.260 (App. 7-9). Judge Mize stated that he could see how, arguably, the state's acknowledgment of the statutory provision was not a waiver (App. 11).

The court denied the state's request for a penalty phase hearing before a jury and denied the motion to continue if that was granted. The court indicated that it would proceed with the sentencing scheduled for 1:30 p.m. February 1, 1991 (App. 20). The court specifically found that a defendant can unilaterally waive a jury in the penalty phase (App. 21; 26). The court further found that the state, at no time, specifically consented to this waiver and objected to sentence being imposed without a penalty phase presentation and resulting recommendation (App. 26). The motion to continue sentencing was denied and the penalty phase was to proceed, as scheduled, on February 1, 1991 (App. 27). The court on its own motion later entered an order

continuing sentencing until *FEBRUARY 22, 1991* at 1:30 p.m. (App. 28).

III. RELIEF SOUGHT:

The state seeks by this petition to have the court prohibit the lower court from conducting penalty phase proceedings in the absence of an advisory jury and to allow the parties sufficient time to prepare for the penalty phase hearing. The state specifically requests that the court enter an order directing the respondent to show cause why relief should not be granted, thereby automatically staying further proceedings in the lower tribunal pursuant to Florida Rule of Appellate Procedure 9.100(f).

IV. ARGUMENT:

The right to a trial by jury is one of the most valuable and highly cherished fundamental rights guaranteed by the Constitution, see, Leonard v. United States, 231 F.2d 588 (5th Cir. 1956), which is forfeited only by waiver which is voluntary and intelligent, especially in connection with a guilty plea. Dumas v. State, 439 So.2d 246 (Fla. 3rd DCA 1983); Nova v. State, 439 So.2d 255 (Fla. 3rd DCA 1983). This is an invaluable right in the context of a capital case with bifurcated proceedings. Both the trial judge before imposing sentence and the supreme court when reviewing the propriety of the death sentence consider as a factor the advisory opinion of the sentencing jury; in some instances, the advisory opinion could be a critical factor in determining whether the death penalty should be imposed. Lamadline v. State, 303 So.2d 17 (Fla. 1974). The jury

sentencing recommendation is to receive great weight and before overruling the jury, the trial court must find that facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Herzog v. State, 439 So.2d 1372 (Fla. 1983).

Neither the United States nor the Florida Constitution confers or recognizes the right of a defendant to have his case tried before a judge without a jury. A trial court does not err in denying a defendant's motion to accept his waiver of trial by jury where the state fails to consent to the motion. Thomas v. State, 328 So.2d 545 (Fla. 3rd DCA 1976). The interests of the state and of defendants in capital cases are adequately preserved by the court rule making waiver of jury trial dependent upon the approval of the court and the consent of the state. State v. Garcia, 224 So.2d 395 (Fla. 3rd DCA 1969), cert. discharged, State v. Garcia, 229 So.2d 236 (Fla. 1969). The consent of the state is a valuable tool in ensuring even application of the death penalty in such cases where a judge may indicate a refusal to impose the death penalty before even proceeding to the penalty phase and an opportunistic defendant attempts to benefit from the judge's disinclination to follow the law, see, Williams v. State, 15 F.L.W. D2914 (Fla. 4th DCA Dec. 5, 1990), or where a remorseful defendant chooses simply to die with as little fanfare as possible or where, as here, there has been an interfamily killing and the defendant is reluctant to cause further stress to family members.

The rules of procedure require the trial court to permit the state and the defendant to present evidence of an aggravating or mitigating nature, consistent with the requirements of section 921.141, Florida Statutes (1987), during the penalty phase. Fla.R.Crim.P. 3.780. Thus, so long as death is a legally available penalty, the trial court must permit the state to present relevant evidence during the penalty phase, if the state wishes to present that evidence. State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990).

Article V §2(a) of the Florida Constitution empowers this court to adopt rules for the practice and procedure in all courts. This court adopted Florida Rule of Criminal Procedure 3.260 which provides "A defendant may in writing waive a jury trial with the consent of the state." Two district courts have found no reason why rule 3.260 should not apply equally to the penalty phase. See, State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990); Williams v. State, 15 F.L.W. D2914 (Fla. 4th DCA Dec. 5, 1990). Indeed, Florida Rule of Criminal Procedure 3.010 provides "These rules shall govern the procedure in all proceedings in State courts..." (Emphasis added). Florida Rule of Criminal Procedure 3.020 similarly provides "These rules are intended to provide for the just determination of every criminal proceeding..." (Emphasis added). Thus, rule 3.260 is the waiver provision that would apply to all criminal proceedings. The rule unequivocally declares that this waiver requires "the consent of the state." The Committee Note to the rule indicates that it was adopted in 1967 and is the same as Federal [Criminal] Rule 23(a)

and changed existing law by providing for the consent of the state.

Section 921.141(1), Florida Statutes (1987), provides as follows:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. (Emphasis added).

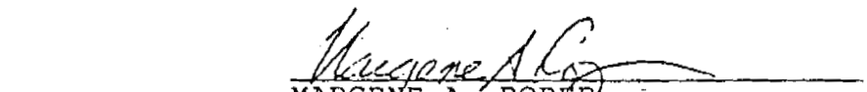
Section 921.141(1) merely recognizes that an advisory jury may be waived, it does not speak to the conditions or circumstances authorizing such waiver and does not prohibit the state's involvement in the waiver of a jury, and, thus, is not inconsistent with rule 3.260 which delineates the conditions for a valid waiver. In a well reasoned decision the Second District Court of Appeal interpreted the statute consistent with the procedures required by rule 3.260 and held that the trial court must permit the state to present its penalty evidence to a jury, unless the state consents to the waiver of the jury. State v. Ferguson, 556 So.2d 462, 464 (Fla. 2d DCA 1990).

In State v. Garcia, 229 So.2d 236 (Fla. 1969), this court applied the waiver provision of then rule 1.260, Florida Rules of Criminal Procedure to capital trials, holding that a defendant who was under indictment for a capital offense to which he had not pleaded guilty, was entitled to waive a jury trial, despite the fact that a statutory provision specifically disallowed jury waiver in capital cases. The court specifically found that the rule superceded the statute and controlled in capital cases, for by the operation of former Florida Rule of Criminal Procedure 1.010, now rule 3.010, the rules govern *all criminal procedure* in state courts. 229 So.2d at 239. In the present case there isn't even a conflicting statutory provision.

Having held that the predecessor rule 3.260 is to be given broad application to all criminal proceedings, with no specific exceptions for capital cases, which includes penalty phase proceedings, section 921.141 should be read only as implementing the intent of rule 3.260.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



MARGENE A. ROPER
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Emergency Petition for Writ of Prohibition has been furnished by Federal Express to The Honorable C. Vernon Mize, Jr., 301 N. Park Avenue, Sanford, Florida 32771; and to Sid J. White, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399; and by U.S. Mail to Gary N. Andersen. Esquire, Office of the Public Defender, Eighteenth Judicial Circuit, 301 N. Park Avenue, Sanford, Florida 32771, this 8th day of February, 1991.

Margene A. Roper
Of Counsel

Supreme Court of Florida

THURSDAY, MAY 23, 1991

STATE OF FLORIDA, Petitioner, v. JOSEPH PATRICK OLSON, Respondent.	**	CASE NO. 77,382
**********	**	
STATE OF FLORIDA, Petitioner, v. C. VERNON MIZE, JR., JUDGE, et al., Respondents.	**	CASE NO. 77,373

The petitioner in the above causes has filed a Notice of Appeal treated as a Petition for Writ of Mandamus in case no. 77,382 and an Emergency Petition for Writ of Prohibition in case no. 77,373, and the same having been duly considered, it is ordered that said Petitions be and the same are hereby denied.

OVERTON, Acting C.J., MCDONALD, BARKETT, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. C. Vernon Mize, Jr., Judge
Margene A. Roper, Esquire
Larry B. Henderson, Esquire
Gary Anderson, Esquire
Thomas W. Hastings, Esquire

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 93-2357

STEPHEN HERNANDEZ,

Respondent.

Opinion filed January 14, 1994

Petition for Certiorari Review of Order from the Circuit Court for Seminole County, C. Vernon Mize, Jr., Judge.

Robert A. Butterworth, Attorney-General, Tallahassee, and Margene A. Roper, Assistant Attorney General, Daytona Beach, and Thomas W. Hastings, Assistant State Attorney, Sanford, for Petitioner.

James B. Gibson, Public Defender, and Larry B. Henderson, Assistant Public Defender, Daytona Beach, for Respondent.

PETERSON, J.

The State of Florida seeks a writ of certiorari to review a non-final pre-sentencing order of the trial court. In the order the court accepted Hernandez's waiver of a sentencing proceeding before a jury after he entered a guilty plea in a capital murder case. When Hernandez waived the right to a sentencing jury, he specifically acknowledged that the trial court had the discretion to impose a sentence of life imprisonment or the death penalty.

The state, in its petition, asserts the trial court was without authority to accept Hernandez' waiver without the state's consent. We deny the petition.

The state argues that Florida Rule of Criminal Procedure 3.260 plainly provides that a defendant may waive a jury trial only with the state's consent. The rule states: "Waiver of Jury Trial.-- A Defendant may in writing waive a jury trial with the consent of the state." The trial court held that section 921.141(1), Florida Statutes (1991) applies and that Hernandez may thereby waive a jury in the penalty phase of his case without the state's consent.

Section 921.141(1), Florida Statutes, provides in part:

> Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
>
> (1) Separate Proceedings on Issue of Penalty. . . . if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant . . . .

We agree with Hernandez and the trial court that the latter need not obtain the state's consent in order to accept the waiver.

The trial court reasoned that, because Rule 3.260 appears only under the heading of Chapter IX of the Rules of Criminal Procedure entitled "Trial," it is applicable only to proceedings contemplated by that chapter and is inapplicable to proceedings in other chapters of the criminal rules. Specifically, the court ruled it is not applicable to Chapter XIV proceedings entitled "Sentencing." We concur for that reason as well as those stated below.

First, Florida's rule 3.260, which allows waiver of jury trials by defendants only with the consent of the state, was adopted in 1968 as Rule 1.260. It could not have been contemplated that the rule was also applicable

to the sentencing phase of a capital murder case because the legislature did not create the bifurcated procedure set forth in section 921.141(1) until 1972. Prior to 1972, there existed no provision to have a jury impaneled for a separate sentencing proceeding in a capital case. The fate of a capital defendant found guilty without a jury rested solely with the court. § 921.141, Fla. Stat. (1971); *see also* § 919.23, Fla. Stat. (1969).

Second, if Rule 3.260 was meant to apply to Chapter XIV sentencings for capital crimes as well as Chapter IX trials, an unintended conflict would arise between the rule and section 921.141. The statute allows waiver of a sentencing jury by a defendant without the state's consent, while the rule, if interpreted to apply to capital sentencing juries, requires such consent. But the provisions of Chapter XIV Rule 3.780, entitled "Sentencing Hearing For Capital Cases" can only allow the conclusion that Rule 3.260 was never meant to be applicable to a capital sentencing hearing. Rule 3.780 specifically refers to, (and inferentially incorporates) section 921.141, with neither a hint that a conflict existed between any rule of procedure and the statutory provision nor any cross-reference to Rule 3.260. Further, the committee notes specifically indicate that Rule 3.780 was "designed to create a uniform procedure that will be consistent with both section 921.141, Fla. Stat. and *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)." *Dixon* set forth in detail a practical guide for the conduct of the sentencing hearing.

In the absence of any rule or statute allowing the state to insist upon the impaneling of the jury contemplated by section 921.141, when the defendant waived such a jury pursuant to subsection (1) of that statute, we find that the trial judge was correct in refusing to comply with the state's insistence. If the state is to have the right to impanel an advisory jury in a capital

felony case after a defendant has entered an unconditional plea of guilt to a capital crime, the supreme court by rule, if the matter is procedural, or the legislature by statute, if the matter is substantive, must provide for that right.

PETITION DENIED.

DAUKSCH and COBB, JJ., concur.

File

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 93-2357

STEPHEN HERNANDEZ,

Respondent.
_____/

MOTION FOR REHEARING/SUGGESTION OF GREAT PUBLIC IMPORTANCE AND EFFECT ON THE ADMINISTRATION OF JUSTICE AND CONFLICT OF DECISION

Petitioner moves the Court for rehearing in this case and further suggests that the issue decided by the Court in its January 14, 1994, opinion is of great public importance within the meaning of Article V, Section 4(2) of the Florida Constitution and will have a great affect on the administration of justice throughout the state and should be so certified to the Supreme Court of Florida. Petitioner also suggests that the decision of this court is also in direct and express conflict with the decision of another district court of appeal and the decision should be so certified pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). As grounds therefor Petitioner submits the following:

1. The opinion suggests that the Court may have overlooked the fact that Section 921.141(1), Florida Statutes (1991) does not *expressly* permit waiver of a sentencing jury by a defendant without the state's consent but rather is silent as to the circumstances and conditions under which such waiver will be

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permitted. Such conditions are apparent in *preexisting* Florida Rule of Criminal Procedure 3.260. Petitioner would suggest that section 921.141 is *substantive* law enacted by the legislature to comply with the constitutional dictates of *Furman v. Georgia*, 408 U.S. 238 (1972). Article V, Section 2(a) of the Florida Constitution empowers the Supreme Court of Florida to adopt *rules* for practice and procedure in all courts. The supremacy of the Florida Supreme Court's rule making power is reflected by the very fact that section 921.141 has been engulfed by the Florida Rules of Criminal Procedure by virtue of its inferential incorporation by Florida Rule of Criminal Procedure 3.780. Florida Rule of Criminal Procedure 3.010 indicates that "These rules shall govern the procedure in *all* criminal proceedings in state courts ..." Rule 3.020 indicates that "These rules are intended to provide for the just determination of *every* criminal proceeding ..." In *State v. Garcia*, 229 So. 2d 236 (Fla. 1969), the Supreme Court of Florida found Florida Rule of Criminal Procedure 1.260 to *supercede* a statutory provision disallowing jury waiver in capital cases for by the operation of Rule 1.010, now Rule 3.010, the rules govern *all criminal procedure* in state courts. 229 So. 2d at 239. Chapter XIV dealing with sentencing cannot be read in a vacuum. Neither that chapter nor Rule 3.780 even provide for a penalty phase jury in the first place. It is not likely such a gap in procedure was intentionally closed by the "inferential" incorporation of section 921.141 into the rules. The right to a trial by jury in the penalty phase, which is a "trial," also arises procedurally by virtue of Florida Rule of

Criminal Procedure 3.251, extending the right to trial by jury to *all* criminal prosecutions. If Rule 3.251 of Chapter IX is read in pari materia with Chapter XIV to create the procedural right to a jury trial in the penalty phase then Rule 3.260, which is set out right below Rule 3.251 should not be interpreted to apply only to Chapter IX. Section 921.141(1) only provides for the impaneling of a jury after a guilty plea. The right to a jury at all in the penalty phase necessarily arises because of Rule 3.251, which relates to "Trials." Petitioner would submit that if the defendant is to have the right to waive an advisory jury in the penalty phase in a capital case without the consent of the state then the Supreme Court by rule or modification of existing rules must provide for the same. The court has not done so since the creation of the bifurcated procedure in 1972. Such modification does not seem imminent or even likely. In *dictum* in *Williams v. State,* 595 So. 2d 936, 938 (Fla. 1992), the Supreme Court of Florida implied that the trial judge made an erroneous ruling concerning the penalty phase in accepting the defendant's waiver of the advisory jury over the objection of the state.

2. Certification pursuant to Florida Rules of Appellate Procedure 9.125 or 9.330 is appropriate in this case on several grounds.

3. The undersigned certifies that she expresses a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate review or resolution by the Supreme Court and is of great public importance and will have a great effect on the administration of justice throughout the state.

PAGE(s) MISSING

The Supreme Court of Florida not only construes the provisions of section 921.141 but also adopts rules of procedure concerning capital cases as well. It has mandatory appellate jurisdiction to review final orders of trial courts imposing death sentences. Fla.R.App.P. 9.030(a)(1)(A)(i). That Court, being the highest court in the state, is uniquely situated so as to best construe statutory provisions and rules concerning penalty phase proceedings so as to ensure not only uniformity of decision but uniform practice throughout the state. As it now stands, the decision of this Court is in conflict with the decision of the Second District Court of Appeal in *State v. Ferguson*, 556 So. 2d 462, 464 (Fla. 2d DCA 1990), which held that the trial court must permit the state to present its penalty evidence to a jury unless it consents to a waiver of the jury.

For the reasons set forth above Petitioner respectfully suggests that this appeal should be certified to the Supreme Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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(904) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, 32114, and by U.S. Mail to Thomas W. hasting, Assistant State Attorney, 100 East First Street, Sanford, Florida 32771, 27th day of January, 1994.

Margene A. Roper
Of Counsel

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1994

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 93-2357
CORRECTED

STEPHEN HERNANDEZ,

Respondent.

Opinion filed March 18, 1994

Petition for Certiorari Review of Order from the Circuit Court for Seminole County, C. Vernon Mize, Jr., Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Margene A. Roper, Assistant Attorney General, Daytona Beach, and Thomas W. Hastings, Assistant State Attorney, Sanford, for Petitioner.

James B. Gibson, Public Defender, and Larry B. Henderson, Assistant Public Defender, Daytona Beach, for Respondent.

ON MOTION FOR REHEARING

PETERSON, J.

We deny rehearing but certify the following question as one of great public importance:

> DOES A TRIAL COURT HAVE THE AUTHORITY TO DISPENSE WITH THE SELECTION OF AN ADVISORY JURY IN THE PENALTY PHASE OF A CAPITAL CASE WITHOUT THE CONSENT OF THE STATE WHEN A DEFENDANT ENTERS A PLEA OF GUILTY, WAIVES AN ADVISORY JURY, AND SPECIFICALLY ACKNOWLEDGES THAT THE TRIAL COURT HAS DISCRETION TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT OR THE DEATH PENALTY?

MOTION FOR REHEARING DENIED.

DAUKSCH and COBB, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, 32114, 16th day of May, 1994.

Margene A. Roper
Of Counsel