017 FILED
SID J. WHITE
JAN 3 1995
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 84,732

JOHN WAYNE UPTON,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NUMBER 0325791

PATRICK MARTIN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NUMBER 0998729

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT

ISSUE/CERTIFIED QUESTION

DOES A LAWYER'S WRITTEN WAIVER OF JURY TRIAL ON BEHALF OF HIS CLIENT VALIDLY WAIVE THE DEFENDANT'S RIGHT TO A JURY TRIAL WHERE THERE IS NO INDICATION IN THE RECORD THAT THE DEFENDANT AGREED TO THE WRITTEN WAIVER OR OTHERWISE MADE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF HIS RIGHT TO TRIAL BY JURY? 4

CONCLUSION 12

CERTIFICATE OF SERVICE 13

APPENDIX 14

TABLE OF CITATIONS

CASES PAGE NO.

Boykin v. Alabama,
395 U.S. 238, 89 S. Ct. 1709,
23 L. Ed. 2d 274 (1968) 4

Brady v. United States,
397 U.S. 742, 90 S. Ct. 1463,
25 L. Ed. 2d 747 (1970) 5

Dumas v. State,
439 So. 2d 246 (Fla. 3rd DCA 1983)
(en banc), review denied,
462 So. 2d 1105 (Fla. 1985) 5,7,8,9

Gideon v. Wainwright,
372 U.S. 335, 83 S. Ct. 792,
9 L. Ed. 2d 799 (1963) 9,10

Hoffman v. State,
397 So. 2d 288 (Fla. 1981) 6

Parker v. State,
36 So. 2d 794 (Fla. 1st DCA 1994) 8,9

Patton v. United States,
281 U.S. 276, 50 S. Ct. 253,
74 L. Ed. 854 (1930) 4

Penson v. Ohio,
488 U.S. 75, 109 S. Ct. 346,
102 L. Ed. 2d 300 (1988) 8

Sessums v. State,
404 So. 2d 1074 (Fla. 3d DCA 1981) 5

State v. Garcia,
229 So. 2d 236 (Fla. 1969) 5

State v. Jones,
204 So. 2d 515 (Fla. 1967) 5

State v. Mank,
501 A. 2d 809 (Me. 1985) 9,10

Tucker v. State,
559 So. 2d 218 (Fla. 1990) 5

TABLE OF CITATIONS

(Continued)

CASES **PAGE NO.**

United States v. Garrett,
727 F. 2d 1003 (11th Cir. 1984), aff'd on other grounds, 471 U.S. 773, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985) 6

United States v. Garsson,
291 F. 646 (U.S.D.C., S.D N.Y. 1923) 10,11

United States v. Robinson,
8 F. 3d 418 (7th Cir. 1993) 6

Williams v. State,
440 So. 2d 1290 (Fla. 4th DCA 1983) 7

PROCEDURAL RULES

Florida Rules of Criminal Procedure

Rule 3.260 5

Rule 3.850 9

PRELIMINARY STATEMENT

Petitioner, the State of Florida, appellee below, will be referred to herein as "the State." Respondent, John Wayne Upton, appellant below, will be referred to herein as "respondent" or by his last name. The record on appeal, consisting of two volumes of pleadings, etc., and two volumes of trial transcript, will be referred to by the symbols "R" and "T" respectively, followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

By information filed on October 16, 1992, respondent was charged with armed burglary of a dwelling with a firearm and two counts of sexual battery with a firearm (R. 1). On January 12, 1993, the respondent filed a "Stipulation for Judge Trial," signed by defense counsel and the prosecutor, which read:

> Now in the Court through undersigned counsel comes the defendant, John Wayne Upton and stipulates a waiver of his right of a Jury Trial and elects to try this matter before the Honorable John Kuder.

(R. 7).

Pursuant to the above written waiver, this case proceeded to a bench trial on February 5, 1993, after which the respondent was found guilty of committing armed burglary with a firearm, one count of sexual battery with a firearm, and one count of the lesser included offense of battery (R. 8). The respondent was adjudicated guilty of all charges and was sentenced to prison for a total term of twelve years with a three-year minimum mandatory term (R. 23-7).

On direct appeal, the First District Court of Appeal reversed the trial court's judgment and sentence because it held the record did not demonstrate that the respondent made a knowing, voluntary, and intelligent waiver of his right to a trial by jury, but certified to this Court a question of great public importance. The State timely invoked the discretionary jurisdiction of this Court based on the certified question.

SUMMARY OF THE ARGUMENT

The written waiver signed by defense counsel but not by the respondent nevertheless shows that Upton knowingly, voluntarily and intelligently waived his right to a jury trial. Implicit in defense counsel's representation to the trial court that the respondent waived his right to a jury is the presumption that he advised his client of that right and the consequences of relinquishing that right. To hold that the defendant's written waiver signed by his defense counsel is inadequate to show a knowing, voluntary and intelligent waiver, thus warranting a new trial, unjustly allows Upton to seek to escape justice from a favorable ruling on his own motion.

ARGUMENT

ISSUE/CERTIFIED QUESTION

DOES A LAWYER'S WRITTEN WAIVER OF JURY TRIAL ON BEHALF OF HIS CLIENT VALIDLY WAIVE THE DEFENDANT'S RIGHT TO A JURY TRIAL WHERE THERE IS NO INDICATION IN THE RECORD THAT THE DEFENDANT AGREED TO THE WRITTEN WAIVER OR OTHERWISE MADE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF HIS RIGHT TO TRIAL BY JURY?

Pursuant to a written waiver of his right to a jury trial signed by defense counsel and the prosecutor, but not by the respondent, Upton was tried without a jury. Having been found guilty, the respondent argued for the first time on appeal that, due to the absence of his signature, the written waiver did not show a knowing and intelligent waiver of his right to a jury and that therefore he was entitled to a new trial. The First District agreed and held that a written waiver signed by defense counsel alone does not show that the respondent made a knowing, voluntary and intelligent waiver of his right to a jury trial. For the following reasons, this Court should answer the certified question in the affirmative and quash the First District's decision below.

While the fundamental right to a jury trial is guaranteed by the sixth amendment to the United States Constitution, it can be waived when a defendant so chooses. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1968); Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930). An effective waiver of a constitutional right must be knowing,

voluntary and intelligent. Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

The waiver of a jury trial is a procedural matter which is governed by rules adopted by this Court. State v. Garcia, 229 So. 2d 236 (Fla. 1969); Dumas v. State, 439 So. 2d 246, 252 (Fla. 3rd DCA 1983)(en banc), review denied, 462 So. 2d 1105 (Fla. 1985). Florida Rule of Criminal Procedure 3.260[1] provides for the waiver of the right to a jury trial and requires only that the waiver be in writing and that the State consent. Sessums v. State, 404 So. 2d 1074 (Fla. 3rd DCA 1981); Dumas, 439 So. 2d at 251. "It has never been a requirement in this state by statute, rule, or case law that *the court* inform the defendant of his right to a jury trial, or that *the court* interrogate the defendant as to the voluntariness of his waiver, or that there be a record examination of the defendant on his understanding of the waiver." Dumas, 439 So. 2d at 251 (emphasis in original); see also Sessums, 404 So. 2d at 1076. Thus, under Florida law a waiver of the right to a jury trial is effective when the defendant has entered a written waiver with the consent of the State.

While Rule 3.260 arguably requires that a waiver be signed by the defendant, the written waiver in the case at bar nevertheless demonstrates a knowing, voluntary, and intelligent waiver, and technical noncompliance with a rule of procedure should not entitle the respondent to a new trial. Tucker v. State, 559 So. 2d 218

---

[1] Rule 3.260 provides: "A defendant may in writing waive a jury trial with the consent of the state."

(Fla. 1990). In Hoffman v. State, 397 So. 2d 288, 290 (Fla. 1981), this Court held:

> We do not condone sloppy work by the state in preparing cases. We realize, however, that mistakes can happen. This Court has previously held that "the violation of a rule of procedure prescribed by this Court does not call for a reversal of a conviction unless the record discloses that non-compliance with the rule resulted in prejudice or harm to the defendant." *Richardson v. State*, 246 So.2d 771, 774 (Fla.1971). *See Leeman v. State*, 357 So. 2d 703 (Fla.1978); *Lackos v. State*, 339 So.2d 217 (Fla.1976); Fla.R.Crim.P. 3.140(o). The rules are not intended to furnish a procedural device to escape justice, and we are again persuaded that the modern trend in criminal cases
>
>> "is to excuse technical defects which have no bearing upon the substantial rights of the parties. When procedural irregularities occur, the emphasis is on determining whether anyone was prejudiced by the departure. A defendant is entitled to a fair trial, not a perfect trial."
>
> 339 So.2d at 219 (quoting Grimes, J.).

See also State v. Mank, 501 A. 2d 809 (Me. 1985)(the defendant's failure to sign a written waiver of his right to a jury trial did not require reversal of his conviction where defense counsel stated to the court that the case was to be heard jury-waived); United States v. Garrett, 727 F. 2d 1003 (11th Cir. 1984), aff'd on other grounds, 471 U.S. 773, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985)(where defense counsel stated he had no objection to the trial court sitting as fact finder, and the defendant did not enter a written waiver, the case was remanded for an evidentiary hearing); United States v. Robinson, 8 F. 3d 418 (7th Cir. 1993)(where the record contained no signed waiver or any colloquy between the trial court and the defendant, the case was remanded

for an evidentiary hearing). Thus, even assuming the respondent's written waiver is technically deficient, because Upton was not prejudiced by this defect, he is not entitled to a new trial.

The written waiver of the respondent's right to a jury trial signed by defense counsel showed a knowing, voluntary, and intelligent waiver. Contra, Williams v. State, 440 So. 2d 1290 (Fla. 4th DCA 1983). The written document indicated that the respondent was aware of his right to a jury trial, and that he authorized his attorney to sign the waiver on his behalf. Furthermore, although respondent was present throughout trial, he never indicated that he opposed the fact that the trial court was acting as the trier of fact in his case. Significantly, the respondent did not allege on appeal that his waiver was not knowingly, voluntarily, or intelligently given, nor did he allege that he was prejudiced in any way. Thus, given the written representations of respondent's trial counsel and respondent's failure to convey any disagreement with the proceedings, there is no doubt that the respondent knowingly, voluntarily, and intelligently agreed to proceed without a jury.

In Dumas v. State, supra, the record on appeal showed that the information was stamped "waived trial by jury with consent of the state," above which the defendant signed his name. 439 So. 2d at 248. The Third District held:

> Where a record shows a waiver, although there is no further evidence that the waiver was executed in open court, there is a presumption that in the regular course of proceedings the defendant, through his attorney, learned of, and waived his consti-

> tutional right to jury trial. The presumption which springs from defendant's signature on the formal charging document denoting waiver of jury trial, is, more precisely, that the defendant was advised by his attorney of his right to trial by jury, the consequences of relinquishing that right, and any advantages to be expected therefrom, all of which makes for the knowing and intelligent waiver required by Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930).

Dumas, 439 So. 2d at 249 (footnotes omitted).

Similarly, in the case at bar, implicit in defense counsel's representation to the trial court that the respondent waived his right to a jury is the presumption that he advised his client of his right to trial by jury, the consequences of relinquishing that right, and any advantages to be expected therefrom.

> It bears emphasis that the right to be represented by counsel is among the most fundamental of rights. We have long recognized that "lawyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963). As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."

Penson v. Ohio, 488 U.S. 75, 84, 109 S. Ct. 346, 352, 102 L. Ed. 2d 300 (1988). The First District's holding that counsel is unable to execute an agreement on behalf of the defendant totally conflicts with the principle that counsel is the sine qua non of a criminal defendant's rights.

A holding in the case at bar that the record shows a trial waiver by counsel would not preclude the respondent from claiming ineffective assistance of counsel by means of a motion for post-trial relief pursuant to Florida Rule of Criminal Procedure 3.850. Dumas, 439 So. 2d at 252; Parker v. State, 636 So. 2d 794 (Fla. 1st DCA 1994). If the respondent was unaware of his right to a jury trial and he would have exercised that right had he known about it, obviously defense counsel was incompetent and the respondent would have a case of ineffective assistance of trial counsel. But to allow the respondent to escape his convictions even though the record conclusively shows that he waived his right to a jury trial would allow him to unjustly benefit from error invited by himself.

In State v. Jones, 204 So. 2d 515 (Fla. 1967), this Court held that prior to Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) Florida courts broadly applied the fundamental error exception to protect against the infringement of a defendant's fundamental rights. 204 So. 2d at 518. Before Gideon, indigent defendants were only given the assistance of counsel in capital trials, and, thus, many defendants were vulnerable to abuse. 204 So. 2d at 518.

> This made it possible for defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be "not guilty" it remained unassailable.
>
> * * *
>
> Prior to the Gideon case the good resulting from the application of the exception over-shadowed the evil, for trial judges, notwithstanding the

absence of objection, were admonished to intervene, sua sponte, and declare a mistrial thus assuring of many uninformed defendants on trial without counsel a fair and impartial trial.

At the present time all defendants in criminal trials who are unable to engage counsel are furnished counsel without charge. Application of the exception is no longer necessary to protect those charged with crime who may be ignorant of their rights. Their rights are now well guarded by defending counsel. Under these circumstances further application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society."

It has been suggested that some courts today seem to be preoccupied primarily in carefully assuring that the criminal has all his rights while at the same time giving little concern to the victim. Upon the shoulders of our courts rests the obligation to recognize and maintain a middle ground which will secure to the defendant on trial the rights afforded him by law without sacrificing protection of society. As Mr. Justice Cardozo explained in Snyder v. Commonwealth of Mass., 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674, 687:

> "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Id. at 518-9.

Judge Learned Hand made the same point in a similar comment:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at

> his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.

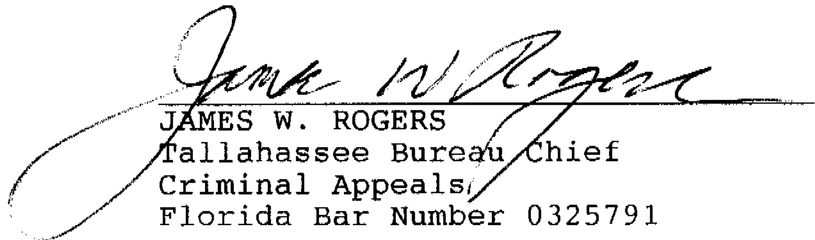
United States v. Garsson, 291 F. 646, 649 (U.S.D.C., S.D N.Y. 1923). The principles set forth in Jones, and by Justice Cardozo and Judge Hand, are equally applicable to the case at bar. The respondent should not be given a new trial when the record shows that he made a knowing, voluntary, and intelligent waiver of his right to a jury through his defense counsel. To hold otherwise would unjustly benefit the respondent at the expense of society. The decision of the First District should be quashed and the certified question answered in the affirmative.

CONCLUSION

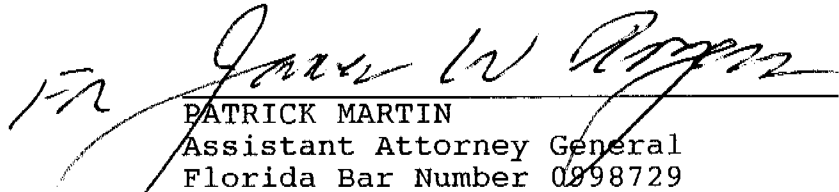
For the reasons set forth herein, the State respectfully requests that this Court answer the certified question in the affirmative and quash the First District's decision below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



JAMES W. ROGERS
Tallahassee Bureau Chief
Criminal Appeals
Florida Bar Number 0325791

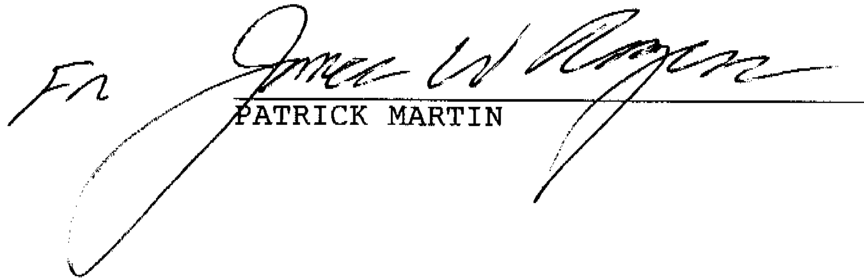


PATRICK MARTIN
Assistant Attorney General
Florida Bar Number 0998729

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MR. JAMIE SPIVEY**, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of January, 1995.



PATRICK MARTIN

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 84,732

JOHN WAYNE UPTON,

Respondent.

______________________________/

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

Upton v. State, ___ So. 2d ___, 19 Fla. L. Weekly D2294 (Fla. 1st DCA October 28, 1994).

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JOHN WAYNE UPTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 93-1583

RECEIVED

OCT 31 1994

CRIMINAL APPEALS
DEPT. OF LEGAL AFFAIRS

Opinion filed October 28, 1994.

An appeal from Circuit Court for Escambia County. John Kuder, Judge.

Nancy A. Daniels, Public Defender, and Jamie Spivey, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

Docketed
10-31-94
Florida Attorney General

ALLEN, J.

The appellant challenges his convictions and sentences following a non-jury trial. Because the record does not demonstrate that the appellant made a knowing, voluntary, and intelligent waiver of his right to trial by jury, we reverse.

The record reveals that the appellant was tried without a jury pursuant to a written waiver signed only by his attorney and the

prosecutor. A defendant's knowing, voluntary, and intelligent waiver of jury trial must appear in the record. Tucker v. State, 559 So. 2d 218 (Fla. 1990); Hurd v. State, 440 So. 2d 691, 693 (Fla. 1st DCA 1983). In this case, there is no indication that the appellant made a knowing, voluntary and intelligent waiver of his right to a jury trial. No inquiry was made of him as to whether he concurred in his attorney's waiver or whether he understood what was meant by waiver of a jury trial. See id.; Tosta v. State, 352 So. 2d 526 (Fla. 4th DCA 1977), cert. denied, 366 So. 2d 885 (Fla. 1978). We therefore reverse the appellant's convictions and sentences and remand for further proceedings. However, we certify to the supreme court the following question of great public importance:

> Does a lawyer's written waiver of jury trial on behalf of his client validly waive the defendant's right to a jury trial where there is no indication in the record that the defendant agreed to the written waiver or otherwise made a knowing, voluntary and intelligent waiver of his right to trial by jury?

REVERSED AND REMANDED.

WEBSTER, J., CONCURS; LAWRENCE, J., CONCURS AND DISSENTS WITH WRITTEN OPINION.

Lawrence, J., concurring and dissenting.

Because I view the instant written waiver, signed by Upton's lawyer, as adequate to waive the client's right to jury trial, I dissent. Neither Tucker v. State, 559 So. 2d 218 (Fla. 1990), nor Hurd v. State, 440 So. 2d 691 (Fla. 1st DCA 1983), requires reversal of Upton's convictions and sentences. The Tucker court held, in response to a certified question, that a defendant's oral waiver of a jury trial is valid where the defendant is represented by a lawyer, and a full explanation of the consequences is given by the trial judge. We merely held in Hurd that, where there is neither a written waiver nor an oral inquiry on the record, any asserted waiver is invalid. The instant record, by contrast, contains a written waiver signed by Upton's lawyer.

Florida Rule of Criminal Procedure 3.260 provides: "A defendant may in writing waive a jury trial with the consent of the state." Even if rule 3.260 required that the written waiver be executed personally by Upton, as opposed to his counsel, the Tucker court made it clear that technical compliance with the rule is not required:

> Technical noncompliance with a rule of procedure is permissible if there is no harm to the defendant. *Hoffman v. State*, 397 So. 2d 288, 290 (Fla. 1981) (the rules of criminal procedure are not intended to furnish a procedural device to escape justice).

Tucker v. State, 559 So. 2d at 220.

We recently held in Parker v. State, 636 So. 2d 794 (Fla. 1st DCA 1994), that Tucker should not be interpreted as requiring the trial court to establish in open court that a waiver was freely and voluntarily made, when technical compliance with rule 3.260 was made. Moreover, we said that "if Parker's waiver was not in fact freely and knowingly given, the appropriate mode of relief is by a Rule 3.850 motion for post-conviction relief." Parker, 636 So. 2d at 795.

We should follow the rationale of our sister court in Dumas v. State, 439 So. 2d 246 (Fla. 3d DCA 1983) (en banc), *review denied,* 462 So. 2d 1105 (Fla. 1985), and conclude that a presumption is raised that a waiver of jury trial is knowingly and intelligently made under the circumstances of the instant case. The burden then would shift to Upton to show facts to the contrary. This would be consistent with our decision in Parker, approving postconviction relief as a remedy, and the rule requiring prejudice, as discussed in Tucker. Significantly, Upton has not alleged at any time that his waiver resulted in prejudice to him.

I agree that this issue is one of great public importance, and therefore join in certification of the question.