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FILED

SID J. WHITE

FEB 27 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 REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
ARGUMENT	3
<u>ISSUE/CERTIFIED QUESTION</u>	
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?	
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

CASES

PAGE NO.

Hoffman v. State, 4
397 So. 2d 288 (Fla. 1981)

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

OTHER AUTHORITIES

Florida Rule of Criminal Procedure 3.260 3,4

Florida Rule of Criminal Procedure 3.850 4

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?

Contrary to the respondent's interpretation, the State did not argue that Upton's written waiver of his right to a jury trial failed to comply with Florida Rule of Criminal Procedure 3.260. As Judge Lawrence argues in his dissenting opinion, the State's position is that the written waiver signed by Upton's lawyer satisfied the requirements of the respondent's constitutional right to a jury trial and also satisfied the requirements of Rule 3.260, which provides:

A defendant may in writing waive a jury trial with the consent of the State.

Rule 3.260 does not require that the written waiver be signed by the defendant; it merely states that the defendant may in writing waive his right to a jury trial. A written waiver signed by a defendant's legal representative should satisfy Rule 3.260. However, if this Court finds that Rule 3.260 requires the written waiver be executed personally by the respondent, as opposed to his counsel, Upton should not be entitled to a new trial due to the failure to comply with the rule because the record nevertheless contains a proper waiver of his right to a jury trial.

Thus, noncompliance with Rule 3.260 should not dictate a per se reversal where the record does not disclose that such noncompliance resulted in prejudice or harm to the defendant. "On appeal, an appellant has the burden of showing prejudice." Hoffman v. State, 397 So. 2d 288, 290 (Fla. 1981). The respondent does not even allege he was harmed. Furthermore, where the record contains a written waiver signed by Upton's lawyer, thus indicating that counsel advised his client of the right being waived and, after so advising his client, represented to the trial court Upton's desire to waive that right, the respondent has failed to show how he was prejudiced.

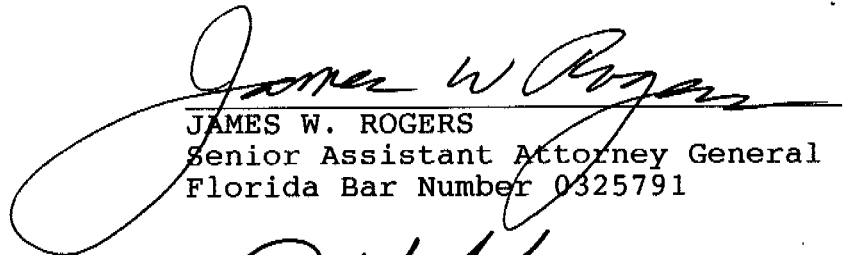
Finally, the State did not argue that this Court should remand this case for an evidentiary hearing, but rather stated an affirmance of the trial court's judgment and sentence does not preclude the respondent from filing an ineffective assistance of counsel claim under Florida Rule of Criminal Procedure 3.850. Unlike a remand for an evidentiary hearing, a Rule 3.850 claim is not affected by the attorney-client privilege and, thus, the problems discussed in Williams v. State, 440 So. 2d 1290 (Fla. 4th DCA 1983) are avoided.

CONCLUSION

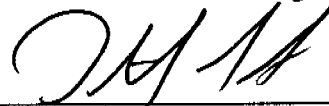
For the reasons set forth herein, the State respectfully requests that this Court answer the certified question in the affirmative and quash the First District's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jamie Spivey, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of February, 1995.



PATRICK MARTIN