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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,509

LANCE BLAIR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON M——

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

Statement of Case and Facts

Respondent supplements Petitioner's statement of the case and facts with the following:

When the State had presented most of its case, but the defense had not yet presented any evidence, the court informed the jury that the case would continue into the next week (T 592). Juror number six, the former alternate, stated that he had to be in Memphis through the following Wednesday at 5 pm, to give a five day seminar which could not be rescheduled (T 592, 599). The juror stated that he was supposed to be flying into Chicago for another seminar on Thursday and Friday (T 595). Defense counsel stated that he had to be out of town the next Friday to surrender a client, but the court stated that that would not take precedence (T 593).

The court suggested postponing the case a week, until the following Monday (T 595). Juror number two stated that the next week would interfere with his commitment to a tournament that week (T 595-596). The following colloquy took place:

> THE COURT: A possible resolution, go with five.
>
> MR. BROWN [defense counsel]: What if both sides agree to go with five?

THE COURT: That's fine with me.

MR. LAWSON [prosecutor]: Judge, the State is willing to *go* along with that.

MR. BROWN: Let me tell you in thirty seconds to discuss it with my client because I don't think it would be fair.

THE COURT: all right.

****

THE COURT: It is my understanding that both attorneys will stipulate that we can excuse juror number six who is Thomas Murray and we will try this case with five jurors and be bound --

MR. LAWSON: Judge, I will go along with that. I only have one request and that is that Mr. Murray put it on the record.

THE COURT: I am going to do that but first I've got to explain to Mr. Blair what we're considering,

MR. LAWSON: Okay.

THE COURT: And then, whatever decision they make will be binding on the Court and on the Defendant. I am going to give you as much time as you need now to discuss that possibility with your client, Mr. Brown.

MR. BROWN: I have already discussed it with him and as opposed to postponing it a week or having a possible mistrial, we would rather go with five and I quickly tried to explain him the alternative.

THE COURT: All right. Let me have you

explain them again. I want to make sure that this is what he wants to do.

MR. BROWN: Well, I told him there is a potential for mistrial. There also is, as the Court has suggested, postponing it a full week until February 1st and I have to admit 1 didn't tune in to what the other guy's problem is going to be, something about an owner coming into town.

THE COURT: Well, he didn't sound that terrifically serious to me.

MR. BROWN: Well, there are other possibilities of postponing it a full week and starting it up again February 1st or going with five jurors. I see that as the three alternatives. I'm sure my client doesn't want a mistrial. So that leaves us with two alternatives, either February 1st starting off again a week later or going with five jurors.

THE DEFENDANT: Your Honor, we will take the five, if that's all right with you.

THE COURT: All right. We will do that then.

(T 596-598).

SUMMARY OF THE ARGUMENT

I. The trial court properly granted Petitioner's request to continue with only five jurors. The Florida and United States Constitutions permit a felony defendant to waive his right to a six-member jury and agree to be tried by a five member jury.

II. To have a valid oral waiver of the right to a six-member jury in a criminal case, it is not essential for the trial court to conduct an on-the-record inquiry with the defendant where the trial court itself specifically advises the defendant that he has a constitutional right to a six-member jury and gives a full explanation of the consequences of the waiver of that right.

In the instant case, it was sufficient that Petitioner was informed that it was his choice whether to accept a five person jury or to explore other alternatives. The fact that defense counsel, rather than the trial court, informed defendant of his rights, does not warrant reversal, as, counsel advised the court that Petitioner fully understood his rights, and, Petitioner corroborated his counsel's assertions. Moreover, the court did not coerce Petitioner in any way, but rather, conveyed that it was open to any alternative Petitioner might choose, and, repeatedly

verified that Petitioner was making a knowing and voluntary choice.

ARGUMENT

POINT I

THE FLORIDA AND UNITED STATES CONSTITUTIONS PERMIT A DEFENDANT TO WAIVE HIS RIGHT TO A SIX-MEMBER JURY AND AGREE TO BE TRIED BY A FIVE MEMBER JURY IN A CRIMINAL CASE.

In Ballew v. Georgia, 435 U.S. 223, 55 L. Ed. 2d 234, 98 S. Ct. 1029 (1978), the United States Supreme Court determined that felony defendants have a constitutional right to be tried by a jury of at least six persons. The Court decided upon six by balancing such factors as the State's economical interest in smaller juries against the defendant's interest in choosing a jury which represented a fair cross-section of the community. However, the general factors which were considered in determining the standard number of jurors in Ballew are not applicable to this case. For example, the Court considered that five jurors would reduce the chance of getting a jury which represented a fair cross-section of the community. However, in the instant case, Petitioner had the added advantage of knowing exactly which jurors he would be getting, thus if he felt that he was not being fairly represented by his own particular community, he need not have voluntarily accepted the arrangement. Moreover, in Ballew the Court considered whether the state had any justifiable interest in reducing their

jury sizes to five persons and concluded that "there was no significant state advantage in reducing the number of jurors from six to five." 435 U.S. at 243. However, in the instant case there was a very significant advantage in reducing the jury to five persons. Finally, the Ballew opinion does not imply that a defendant cannot waive his right to a six person jury and accept a jury of five. Rather, the Court explicitly stated that it was unable to discern a clear line between six members and five. 434 U.S. at 239.

The Fourth District pointed out the following in the instant opinion:

> As with any other guaranteed Constitutional right there is nothing preventing a defendant from waiving fundamental rights when a defendant so chooses. Bovkin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 274 (1969). The United States Supreme Court has held that one charged with a serious crime may dispense with his constitutional right to a jury trial, Adams v. United States ex rel. McCann, 317 U.S. 269, 277-78, 63 S. Ct. 236, 241, 87 L. Ed.. 268 (1942), either by waiver of a jury trial altogether or by consenting to a trial by fewer than the required number of jurors. Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930).

Blair v. State, 667 So. 2d 834 (Fla. 4th DCA 1996).

In Sanford v, Rubin, 237 So. 2d 134 (Fla. 1970), this Court

recognized that even Constitutional rights can be waived. For example, Petitioner could have waived his right to a jury trial altogether. Zellers v. State, 138 Fla. 158, 189 So. 236 (1939). In the instant case Petitioner knowingly waived his right to have six jurors in order to prevent a continuance, when, the jury had heard most of the State's case and Petitioner had not yet had the opportunity to present his own extensive defense.

It was certainly unfortunate that, when the case was well underway, a second juror, the former alternate, became unavailable. However, once the unavoidable had occurred, Petitioner had several conflicting rights which had to be protected: 1) Petitioner had the right to request a continuance so that he could have all six jurors hear his case; 2) If it was shown that another juror would become unavoidably unavailable, Petitioner would have had the right to begin a new trial; 3) Petitioner would have had the right to request a mistrial right away if he was able to articulate reasons why a continuance would have been unacceptable; and, finally, 4) Petitioner had the right, which he chose to exercise, namely, to proceed immediately with the jury that had already been selected.

In United States v. Jorn, 400 U.S. 470, 486, 27 L. Ed. 2d 543, 557, 91 s. ct. 547, 557 (1971), the United States Supreme Court concluded that a trial court had abused its discretion because it

did not recognize "the importance to the defendant of being able to once and for all, conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." As the Supreme Court recognized, Petitioner may have had many reasons for wanting to continue immediately with the five person jury: Petitioner may not have wanted the jury to be absent a week after only hearing the State's case; Petitioner had reason to fear that in another week's time one of the other juror's **may** have become unavailable, making a mistrial unavoidable; and, Petitioner may not have wanted to spend another week incarcerated if he felt that he had a chance of being acquitted by the jury which he had selected.

In Thomason v. State, 620 So. 2d 1234, 1237 (Fla. 1993), this Court recognized that a "defendant has a 'valued right' to have his trial completed by a particular jury." and "'[e]ven when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal he **may** nonetheless desire to 'go to the first jury, and, perhaps, end the dispute then and there with an acquittal'" (citations omitted). In Cohens v. Elwell, 600 So. 2d 1224, 1227 (Fla. 1st DCA 1992), the court recognized that "[a] defendant's right to have his fate determined as expeditiously as possible and by the first jury to which the case is presented is a

basic one, and may not be set aside without strong reason." In fact, in Perkins v. Graziano, 608 So. 2d 532 (Fla. 5th DCA 1992), the court concluded that the trial court had erred because it did not honor Petitioner's request to finish trying the case with only five jurors.

This case presents a classic example of "sandbagging." During the trial, Petitioner made a choice which he apparently believed to be in his best interest. Now that Petitioner has failed to garner an acquittal, he is attempting to take the proverbial "second bite at the apple."

Although a defendant has a constitutional right to have a trial with at least six jurors, and Petitioner would have been free to exercise that right had he so chosen, there is nothing fundamentally wrong with a five person jury. In fact, Florida case law even allows defendants to waive their right to a unanimous six person jury. Flanning v. State, 597 So. 2d 864 (Fla. 3d DCA 1992). A defendant who waives his right to a unanimous jury gives up a far greater right than a defendant who merely allows his jury to be reduced to five persons, but, still requires that his jury reach a unanimous verdict. In Flanning the defendant was properly convicted even though only five out of six persons believed he was guilty beyond a reasonable doubt, and, the sixth person could not

be convinced the defendant was not innocent. Whereas in the instant case, the State was still required to prove to five out of five jurors that Petitioner was guilty beyond a reasonable doubt. Moreover, in Flanning at the time that the defendant waived his right, he was aware that at least one person on the jury was convinced that he was guilty beyond a reasonable doubt. In the instant case, when Petitioner exercised his right, the jurors still presumed him innocent.

In Sanchez v. United States, 782 F. 2d 928 (11th Cir. 1986), the court stated that a federal defendant could waive his right to a unanimous verdict, and could be convicted, when as few as nine out of twelve jurors voted for conviction. Thus, in Sanchez a defendant could be adjudicated guilty and incarcerated even though as many as three jurors could not be convinced that he was anything but innocent. The right that Petitioner relinquished was not nearly as serious as abandoning the right to a unanimous jury[1].

Other rights which defendants can waive include: The right to be present during the trial. Amazon v. State, 487 So. 2d 8 (Fla. 1986); Peede v. State, 474 So. 2d 808 (Fla. 1985); The right to remain silent. Jordan v. State, 334 So. 2d 589 (Fla. 589); The right to have the judge present during trial proceedings. Fryant v. State, 656 So. 2d 426 (Fla. 1995); The right to a speedy trial. Brvant v. State, 650 So. 2d 68 (Fla. 5th DCA 1994); The right to a conflict free judge and lawyer. Steinhorst v. State, 636 So. 2d 498 (Fla. 1994); U.S. v. Rodrisuez, 982 F. 2d 474 (11th Cir.), cert.

In his brief, Petitioner relies on Burch v. State, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979), for the proposition that conviction of a nonpetty offense by a non-unanimous six person jury violates the law. However, Burch is inapposite, as in Burch the defendant did not waive his rights, but rather, Louisiana law at that time mandated in all cases that a verdict could be reached when five out of six jurors agreed. The Burch case does not address whether a defendant, herself, could elect to accept a non-unanimous verdict.

In conclusion, the United States Supreme Court did determine that on a broad level the Federal Constitution entitles a felony defendant to a six person jury, if they desire one. However, on an individual level there may be no substantive difference between a six person jury and a five person jury. Petitioner has failed to articulate a convincing reason to support the proposition that the right to a six member jury can never be waived when other Constitutional and fundamental rights can be waived.

Denied., 114 S. Ct. 275, 126 L. Ed. 2d 226 (1993); Wosely v. State, 590 so. 2d 979 (Fla. 1st DCA 1991); Roberts v. State, 573 So. 2d 964 (Fla. 2d DCA 1991); The right to testify. Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988); And, The right to an habitual offender hearing. State v. Will, 645 So. 2d 91 (Fla. 3d DCA 1994).

POINT II

TO HAVE A VALID ORAL WAIVER OF THE RIGHT TO A SIX-MEMBER JURY IN A CRIMINAL CASE, IT IS NOT ESSENTIAL FOR THE TRIAL COURT TO CONDUCT AN ON-THE-RECORD INQUIRY WITH THE DEFENDANT WHERE THE TRIAL COURT ITSELF SPECIFICALLY ADVISES THE DEFENDANT THAT HE HAS A CONSTITUTIONAL RIGHT TO A SIX-MEMBER JURY AND GIVES A FULL EXPLANATION OF THE CONSEQUENCES OF THE WAIVER OF THAT RIGHT. (RESTATED)

Petitioner's waiver of his right to a six-person jury was knowing, voluntary and intelligent. Petitioner was informed that it was his choice whether to accept a five person jury or explore other alternatives. Petitioner's counsel advised the court that Petitioner fully understood his rights and Petitioner corroborated his counsel's assertions. Moreover the court did not coerce Petitioner in any way, but rather, conveyed that it was open to any alternative Petitioner might choose, and, repeatedly verified that Petitioner was making a knowing and voluntary choice. Despite all of these facts, Petitioner and the dissenting judge below argue that a waiver cannot be adequate unless certain procedural requirements are met. This view is incorrect. Moreover, adopting a hard and fast rule would create a great risk of unwarranted reversals.

Petitioner and the dissenting judge argue that the waiver was invalid because Petitioner was not specifically advised that the

right he was relinquishing was a Constitution& one. **Blair** 667 So. 2d at 843 (Pariente, J., dissenting). However neither Petitioner nor Judge Pariente have provided any precedent to support the proposition that it is insufficient to inform a defendant that he has a right unless the defendant is specifically informed that the right comes from the Constitution. In the instant case, Petitioner was informed that he had a right to a six person jury and that the decision to waive that right was his. Such knowledge is all that has been required in any of the cases known to Respondent.

Petitioner and Judge Pariente also suggest that the Court should apply either the actual requirements or a modified version of the following waiver requirements articulated in **Flanning**, 597 So. 2d 864 and Sanchez, 782 F. 2d 928:

> Before allowing the defendant to waive the right [to a unanimous jury], the following criteria should be met: (1) the waiver should be initiated by the defendant, not the judge or prosecutor; (2) the jury must have had a reasonable time to deliberate and should have told the court only that it could not reach a decision, but not how it stood numerically; (3) the judge should carefully explain to the defendant the right to a unanimous verdict and the consequences of waiver of that right; and (4) the judge should question the defendant directly to determine whether the waiver is being made knowing and voluntary.

Flanning, 597 So. 2d at 867-88 (quoting Sanchez, 782 F. 2d at 934).

Judge Pariente suggested the following modified requirements:

> 1) The decision to go with less than six jurors be initiated by the defendant, not the judge or prosecutor;
>
> 2) before entertaining this possibility the trial court should assure itself that it has exhausted all viable scheduling options and alternatives with the six-member jury;
>
> 3) after giving defendant a reasonable time to consult with counsel, the trial court on the record should carefully explain to the defendant his or her constitutional right to a six member jury and the consequences of waiving that right; and
>
> 4) the trial judge should question the defendant directly to determine whether the waiver is being made knowingly and voluntarily and not as a result of any perceived pressure from the court.

667 So. 2d at 845.

On their face, the Flanning and Sanchez requirements could not possibly be applied to the instant case. Moreover, the considerations involved in Sanchez and Flanning (conviction even though certain jurors may be convinced the defendant is innocent), were much more serious than the considerations involved in this case. Therefore, there was no need for as in depth a colloquy in this case.

Moreover, strict application of the Flanning/Sanchez

requirements or Judge Pariente's modified version could actually deprive defendants of certain rights. For example, application of the first requirement would act **as an** absolute bar to **a** defendant's decision-making, whenever a trial judge is the first to mention an option. If Petitioner had been forced to accept a delay merely **because** the court was the first to mention the option of continuing with **a** five person jury, Petitioner may have had **a** cognizable claim for reversal on appeal. See Perkins v. Graziano, 608 So. 2d 532 (Fla. 5th DCA 1992). Moreover, any alleged error created by the trial court's statement would have been harmless, as, there was no showing that Petitioner even heard the judge's suggestion, and, defense counsel responded as if he too had not heard the suggestion, stating, "What if both sides agree to go with five?" Thus, Petitioner had no reason to suspect that the court may have preferred this alternative.

The first requirement was adopted in Flanning because it is never entirely clear whether a jury will be **able** to **reach a** verdict, and, the appellate court feared that **a** judge's comment could pressure a defendant into a premature decision. However, in the instant case, it was clear that a problem had arisen and that Petitioner would have to make a choice. There **was** nothing wrong with the trial judge articulating possible alternatives. And, as

the majority concluded below, the trial court did not pressure Petitioner, but, rather, conveyed that it was open to all alternatives and that the choice was entirely Petitioner's. 667 so. 2d at 839.

The trial court did comply with the last three requirements articulated by Judge Pariente, **as,** the court exhausted all other viable alternatives and gave defense counsel ample time to explain everything to Petitioner. Moreover, the court continually questioned Petitioner's knowledge and voluntariness. Further, even after being assured by defense counsel that Petitioner understood all alternatives, the court required counsel to repeat some of his explanations in open court. And, Finally, Petitioner, himself, stated his preference directly to the court (T 598). This waiver was far more trustworthy than the waivers in Sanchez, which were found to be knowingly and intelligently made even though non-unanimity was the defense attorneys' idea, and, several of the defendants did not even speak English.

Petitioner argues that the colloquy was insufficient because the court accepted defense counsel's assertions that Petitioner understood his rights. However, there was no reason for the court to assume that counsel's assertions were not truthful, particularly

where Petitioner directly corroborated his understanding.[2] As the majority concluded below, "a reversal is not warranted because defense counsel, rather than the trial court, informed defendant of his rights in light of the fact that the waiver was on the record and confirmed by the trial court," 667 So. 2d at 839.

Finally, Petitioner argues that he **was** incorrectly informed that if he did not elect to continue with five jurors, he would be forced to accept **a** mistrial. As the majority concluded below, such an interpretation is not supported by the record. Id, Rather, it is clear that at **a** minimum, counsel advised his client that he had a choice between a continuance, continuing immediately with five jurors or requesting **a** mistrial. Counsel also stated that since he knew his client did not want **a** mistrial, the only real choice was between a continuance and continuing with five jurors. The transcript cannot be rewritten, and underlining does not change the facts.

---

[2] If Petitioner chooses to argue that his counsel misled the court, then such **a** claim would have to be pursued via a post-conviction ineffective assistance of counsel claim. Under Strickland v. Washington, 466 U.S. 668, 686 (1984), Petitioner would have the burden of showing that his counsel's advice was deficient, that he detrimentally relied on that advice, and that without the deficient advise the result of the proceedings would have been different.

CONCLUSION

WHEREFORE, based on the above and foregoing reasons and authorities cited therein, Respondent respectfully requests that this Court answer the first certified question in the positive and the second in the negative, and, affirm Petitioner's conviction.

Respectfully submitted,

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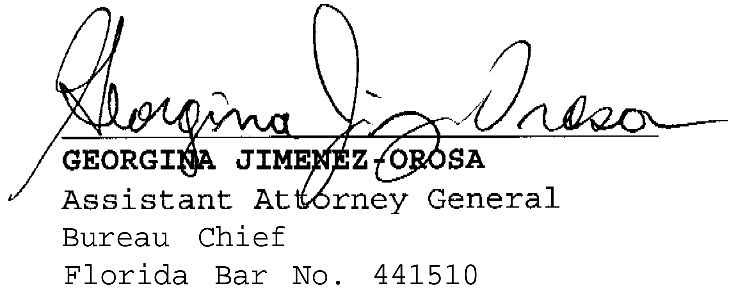

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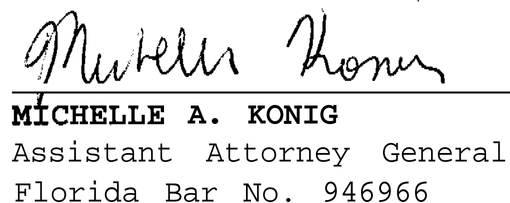

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Brief of Respondent on Merits" has been furnished by courier to: Steven Malone, Assistant Public Defender, Criminal Justice Building, 421 3rd Street/6th Floor, West Palm Beach, Florida 33401, Florida 32118, this 7th day of June, 1996.

Of Counsel