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**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**FILED**

SID J. WHITE

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CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

**LANCE BLAIR,**

**Appellant,**

**vs.**

**STATE OF FLORIDA,**

**Appellee.**

**CASE NO. 87,509**

**PETITIONERS REPLY BRIEF ON THE MERITS**

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## PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in th  
Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For  
Palm Beach County, Florida.

In the brief, the parties will be referred to **as** they appear before this  
Honorable Court of Appeal.

The symbol "RB" will denote Respondent's brief.

The symbol "ST" will denote Trial Transcript, which was filed April 4, 1994.

**STATEMENT OF THE CASE**

Petitioner relies on his statement of the case as stated in his brief on the merits.

**STATEMENT OF THE FACTS**

Petitioner relies on his statement of the facts as stated in his brief on the merits.

## ARGUMENT

### POINT I

#### **THE TRIAL COURT'S MID-TRIAL REDUCTION OF THE JURY TO FIVE MEMBERS WITHOUT AN ADEQUATE INQUIRY OF THE DEFENDANT RENDERS THE CONVICTIONS AND SENTENCES UNCONSTITUTIONAL.**

##### **B. A Felony Jury of Less than Six Members is Unlawful**

The state argues a six member jury can be waived down to five in the midst of trial. It relies heavily on Flanning<sup>1</sup> and Sanchez<sup>2</sup>, which permit waiver of jury unanimity, to support its argument by analogy. But Sanchez, on which Flanning is based, has been rejected by other federal circuits, and has been followed by no other on this point. United States v. Ullah, 976 F.2d 509, 512-513 (9th Cir. 1992)("Despite the overwhelming and irrefutable authority to the contrary, the government urges us to adopt the singular view of the Eleventh Circuit, which permits the unanimity requirement of Rule 31(a) to be waived in 'exceptional circumstances.' See Sanchez v. United States, 782 F.2d 928, 932-34 (11th Cir. 1986). We reject that invitation"). Though the complete rejection of Sanchez was pointed out in the Petitioner's Initial Brief, the state has not offered any good reason why Flanning remains persuasive. The Flanning decision is based on highly questionable authority, and should not be followed by this Court.

Most of the state's argument relies on Flanning. Since Flanning authorizes midtrial waiver of juror unanimity, which the state contends is a "far greater right" than six jurors, the state argues that midtrial reduction to five jurors should also be

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<sup>1</sup> Flanning v. State, 597 So. 2d 864 (Fla. 3d DCA), review denied, 605 So. 2d 1266 (Fla. 1992).

<sup>2</sup> Sanchez v. United States, 782 F.2d 928 (11th Cir. 1986).

permitted. **RE** at 11-12. The state cites no authority for its proposition that jury unanimity is a "greater right" than having at least six jurors in a felony case. Decisions of the Court show it is not.

The Court has approved the use of nonunanimous verdicts for the state courts without any waiver at all in felony cases, in *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), and *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). But Court approval of the states' use of nonunanimous verdicts has been reserved exclusively for juries composed of more than six members. In *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), the Court held it was unconstitutional for a felony jury composed of six to enter a verdict on less than a unanimous vote. In terms of which is the more favored right, the Court's decisions show it is the number of jurors involved (not less than six), and not necessarily their unanimity, which is accorded the greater constitutional protection. See also *Eriffith v. State*, 561 So. 2d 528, 530 (Fla. 1990)("a defendant's right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution").

Finally, the state argues 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 rights can be. **RB** at 13. The Court articulated those reasons in *Ballew*, finding that "any further reduction [from six jurors] promotes inaccuracy and possibly biased decision making, [] causes untoward differences in verdicts, and [] prevents juries from truly representing their communities . . . ." *Ballew*, 435 U.S. at 239, 98 S.Ct. at 1039.

### **C. The Waiver of a Six Member Jury Here was Insufficient**

The state contends the waiver of a six member jury was knowing, intelligent,

and voluntary. It repeatedly represents that petitioner was fully advised of his rights, **both** by counsel and the court. **RB 14, 15, 18.** The state specifically contends that "Petitioner was informed that he had a right to a six person jury and that the decision to waive that right was his," **RB 15,** and that "the court continually questioned Petitioner's knowledge and voluntariness." **RB 18.** The state offers no record support for the assertions that petitioner was informed of his right to a six member jury and that the court inquired into the knowing, voluntary and intelligent nature of the waiver. That is because there is no such record support.

The entire discussion of the five member **jury** is contained at pages **ST 591-600** of the trial transcript, and those pages are reproduced in the appendix to Petitioner's Initial Brief. At no time did the court or counsel explain to appellant that he had a right to a jury composed of six members. At no time did the court question petitioner about his "knowledge and voluntariness." The colloquy relied upon by the state to **show** a knowing, intelligent and voluntary waiver cannot be underlined, because it does not exist.

The state contends petitioner's (and Judge Pariente's) argument to be "that the waiver was invalid because Petitioner was not specifically advised that the right he was relinquishing was a ***Constitutional*** one. **Blair 667 So. 2d at 843** (Pariente, J., dissenting)." **RB** at 14-15 (emphasis in Respondent's Brief). There is no need for petitioner to argue he should have been informed he had a ***constitutional*** right to a six member jury, since he was never informed he had such a right, constitutional or otherwise.

Petitioner's argument is that one of the reasons why the waiver is not valid is because he was not informed he had a right to a six member jury. "The key phrase here is 'known right.'" **Blair, 667 So. 2d at 843** (Pariente, J., concurring and



dissenting). The requirement that one must know of the right to waive it is not a new one in the law. "For a waiver to be valid under the due process clause there must be 'an intentional relinquishment or abandonment of a known right or privilege.'" Blair, 667 So. 2d at 843 (Pariente, J.) quoting *Boykin v. Alabama*, 395 U.S. 238, 243 n. 5, 89 S.Ct. 1709, 1712 n. 5, 23 L.Ed.2d 274,280 n. 5 (1969) (emphasis supplied). Accord, *Patton v. United States*, 281 U.S. 276, 312-313, 50 S.Ct. 253, 263, 74 L.Ed. 854, 870 (1930)(waiver of jury trial right); *Turner v. State*, 530 So. 2d 49 (Fla. 1994)("A defendant cannot knowingly and intelligently waive a right of which he is unaware"); *Tucker v. State*, 559 So. 2d 218 (Fla. 1990)(oral waiver of right to jury trial permitted only where "a full explanation of the consequences is given by the trial judge"). Since petitioner was never informed of his right to a six member jury, he cannot be said to have knowingly and intelligently waived it.

The state contends the record does not support petitioner's claim he was misled on the alternatives to agreeing to a five member jury. **RB** 19. But it does, as discussed in the Initial Brief. It is irrelevant that petitioner was also advised of a lawful alternative, a continuance, in addition to the inaccurate advice that a mistrial could be granted against his wishes. The misinformation still infected the decision to waive his right to a six member **jury**, and prevents it from being found to be knowing, intelligent and voluntary.

#### **D. Relief**

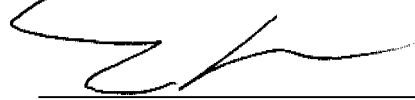
The state does not address petitioner's argument on relief, thus conceding that he is entitled to the acquittal of the firearm charge on Count I, even if this court finds the jury was unlawfully composed.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse this cause with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MICHELLE KONIG, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Floor, West Palm Beach, Florida, 33401 by courier ~~this 11th day~~ of JULY, 1996,



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Attorney for Lance Blair