No.

IN THE SUPREME COURT OF THE UNITED STATES

NAFTALI DOMINGUEZ ZENON, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAREY HAUGHWOUT
Public Defender

Benjamin Hunter Eisenberg
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600
beisenberg@pd15.state.fl.us
appeals@pd15.org

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NEFTALI DOMINGUEZ ZENON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2022-1092

[January 10, 2024]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jeffrey Dana Gillen, Judge; L.T. Case No. 502020CF004944AMB.

Carey Haughwout, Public Defender, and Cynthia L. Anderson, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Pablo Tapia, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Neftali Dominguez Zenon appeals his conviction and life sentence. We affirm without discussion in part and reverse in part. We reverse on two issues.

First, the circuit court's written cost order included a $200 cost of prosecution pursuant to section 938.27, Florida Statutes (2022), and $100 operating trust fund pursuant to section 938.055, Florida Statutes (2022). The State concedes that the record does not contain sufficient findings to justify the $200 in prosecution costs and also concedes that the $100 discretionary cost must be reversed. We agree and reverse the imposition of the $200 cost of prosecution and $100 discretionary operating trust fund cost. *See, e.g.*, *Bartolone v. State*, 327 So. 3d 331, 335–36 (Fla. 4th DCA 2021). On remand, the circuit court is permitted to reimpose the $200 cost of prosecution if the State submits "sufficient proof of higher costs incurred. *Id.* at 335.

Second, the circuit court orally sentenced Zenon to mandatory life without parole on count one and time served on count two. The written judgment reflects both convictions. But only one written sentencing order exists in the record for count one. That sentencing order specifies count one is to run concurrently to count two. On remand, the circuit court shall enter a written sentencing order that conforms to the oral pronouncement. *See Moreland v. State*, 853 So. 2d 574, 575 (Fla. 4th DCA 2003) (remanding for the trial court to correct the sentencing order to reflect its oral pronouncement).

Affirmed in part, reversed in part, and remanded.

KLINGENSMITH, C.J., FORST and KUNTZ, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

February 14, 2024

Neftali Dominguez Zenon, Appellant(s) v. State of Florida, Appellee(s).	**CASE NO. - 4D2022-1092** L.T. No. - 502020CF004944AMB

BY ORDER OF THE COURT:

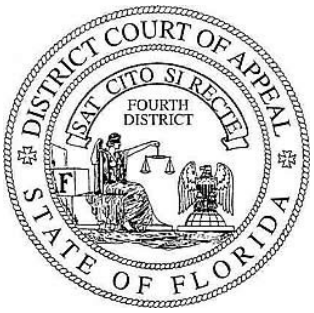
ORDERED that Appellant's January 16, 2024 motion for written opinion is denied.

Served:
Cynthia Lorraine Anderson
Attorney General-W.P.B.
Christine C. Geraghty
Palm Beach Public Defender
Malik Ramelize
Pablo Ignacio Tapia

KR

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.

Lonn Weissblum
4D2022-1092 February 14, 2024
LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2022-1092 February 14, 2024



V. Dominguez Zenon was entitled to a twelve person jury under the sixth and fourteenth amendments and he did not waive that right.

Dominguez Zenon was convicted by a jury comprised of a mere six people. T 238. He argues that the Sixth and Fourteenth Amendments guarantee the right to a twelve-person jury when the defendant is charged with a felony.

A. Standard of review

The standard of review of constitutional claims is de novo. *See A.B. v. Florida Dept. of Children & Family Service*s, 901 So. 2d 324, 326 (Fla. 3d DCA 2005).

B. Dominguez Zenon acknowledges Guzman, pending before the Florida Supreme Court, wrote on the identical issue

Dominguez Zenon notes this Court decided *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022) pending SC22-1597, which rejected the constitutional argument "that his convictions by a six-person jury violated the Sixth and Fourteenth Amendments to the United States Constitution." *Id.* at 73. The majority opinion in *Guzman* found this Court was bound by the United States Supreme Court's holding in *Williams* that six-person juries are constitutionally permissible until the high court expressly revisited that holding. *Id.*

In a concurring opinion, Judge Gross "explain[ed] that [the defendant's] legal argument on jury composition present[ed] a classic example of how the law navigates the shifting sands of constitutional analysis." *Id.* at 75 (Gross, J., concurring). Although disagreeing with the defendant that *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), had overturned *Williams*, Judge Gross wrote that, "if applied to the issue of jury size, the originalist analysis in *Ramos* would undercut *Williams*'s functionalist underpinnings." *Id.* at 78 (Gross, J, concurring). "At a minimum, *Ramos* . . . suggests that *Williams* was wrongly decided." *Id.* (Gross, J., concurring). Furthermore, the defendant "has a credible argument that the original public meaning of the Sixth Amendment right to a 'trial by an impartial jury' *included* the right to a 12-person jury. *Id.* (Gross, J., concurring).

Guzman is currently pending before the Florida Supreme Court. Appellate attorneys have the obligation to "zealously assert[] the client's position under the rules of the adversary system." R. Regulating Fla. Bar prmbl. As part of this obligation, undersigned "[c]ounsel has the responsibility to make such [arguments] as may be necessary to keep the defendant's case in an appellate 'pipeline.'" *Sandoval v. State*, 884 So. 2d 214, 217 n. 1 (Fla. 2d DCA 2004).

Therefore, although acknowledging this Court is bound by *Guzman*, Dominguez Zenon seeks to preserve this argument for further review by requesting a cite to *Guzman*.

C. Analysis

On its merits, Dominguez Zenon was charged with two capital offenses. R.72; But, his was not a "capital case" because death was not a possible punishment. *Hogan v. State*, 451 So. 2d 844, 846 (Fla. 1984); *see also Phillips v. State*, 316 So. 3d 779, 786 (Fla. 1st DCA 2021). Although the mandatory LWOP sentence Dominguez Zenon received is an effective death sentence. *See* Point II.

However, currently in Florida the statutory requirement for a twelve person jury was not triggered. *See* § 913.10, Fla. Stat. (2013). Even though, Dominguez Zenon was not entitled to a twelve person jury based on Florida Statutory law, he still had a constitutional right to one.

Although the Supreme Court held in *Williams v. Florida*, 399 U.S. 78, 86 (1970), that juries as small as six were constitutionally permissible, *Williams* is impossible to square with the Supreme Court's ruling in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which concluded that the Sixth Amendment's "trial by an impartial jury"

requirement encompasses what the term "meant at the time of the Sixth Amendment's adoption," *id.* at 1395; U.S. Const. amend. VI.

Prior to 1970, subjecting Dominguez Zenon to a trial with only six jurors would have indisputably violated his Sixth Amendment rights. As the *Ramos* Court observed, even Blackstone recognized that under the common law, "no person could be found guilty of a serious crime unless 'the truth of every accusation … should … be confirmed by the unanimous suffrage of twelve of his equals and neighbors[.]" *Ramos*, 140 S. Ct. at 1395. "A 'verdict, taken from eleven, was no verdict' at all." *Id.*

After the Sixth Amendment was enacted, a bevy of state courts—ranging from Alabama to Missouri to New Hampshire—interpreted it to require a twelve-person jury. *See Miller*, *Comment, Six of One Is Not A Dozen of the Other*, 146 U. PA. L. REV. 621, 643 n.133 (1998) (collecting cases from the late 1700s to the 1860s). In 1898, the U.S. Supreme Court added its voice to the chorus, noting that the Sixth Amendment protects a defendant's right to be tried by a twelve-person jury. *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898) *overruled on other grounds* by *Collins v. Youngblood*, 497 U.S. 37, 51-52 (1990). As the *Thompson* Court explained, since the time

of Magna Carta, the word "jury" had been understood to mean a body of twelve people. *Id.* Given that understanding had been accepted since 1215, the Court reasoned, "[i]t must" have been "that the word 'jury'" in the Sixth Amendment was "placed in the constitution of the United States with reference to [that] meaning affixed to [it]." *Id.* at 350.

The Supreme Court continued to cite the basic principle that the Sixth Amendment requires a twelve-person jury in criminal cases for seventy more years. For example, in 1900, the Court explained that "there [could] be no doubt" "[t]hat a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution." *Maxwell v. Dow*, 176 U.S. 581, 586 (1900). Thirty years later, the Court reiterated that it was "not open to question" that "the phrase 'trial by jury'" in the Constitution incorporated juries' "essential elements" as "they were recognized in this country and England," including the requirement that they "consist of twelve men, neither more nor less." *Patton v. United States*, 281 U.S. 276, 288 (1930). And as recently as 1968, the Court remarked that "by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries

and carried impressive credentials traced by many to Magna Carta," such as the necessary inclusion of twelve members. *Duncan v. Louisiana*, 391 U.S. 145, 151-152 (1968).[8]

In 1970, however, the *Williams* Court overruled this line of precedent in a decision that Justice Harlan described as "stripping off the livery of history from the jury trial" and ignoring both "the intent of the Framers" and the Court's long held understanding that constitutional "provisions are framed in the language of the English common law [] and … read in the light of its history." *Baldwin v. New York*, 399 U.S. 117, 122-24 (1970) (citation omitted) (Harlan, J., concurring in the result in *Williams*). Indeed, *Williams* recognized that the Framers "may well" have had "the usual expectation" in drafting the Sixth Amendment "that the jury would consist of 12" members. *Williams*, 399 U.S. at 98-99. But *Williams* concluded that such "purely historical considerations" were not dispositive. *Id.* at 99.

---

[8] *See also*, *e.g.*, *Capital Traction Co v. Hof*, 174 U.S. 1, 13 (1899) ("'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men" but also contains other requirements); *Rassmussen v. United States*, 197 U.S. 516, 529 (1905) ("The constitutional requirement that 'the trial of all crimes, except in cases of impeachment, shall be by jury,' means, as this court has adjudged, a trial by the historical, common-law jury of twelve persons").

Rather, the Court focused on the "function" that the jury plays in the Constitution, concluding that the "essential feature" of a jury is it leaves justice to the "commonsense judgment of a group of laymen" and thus allows "guilt or innocence" to be determined via "community participation and [with] shared responsibility." *Id.* at 100-01. According to the *Williams* Court, both "currently available evidence [and] theory" suggested that function could just as easily be performed with six jurors as with twelve. *Id.* at 101-102 & n.48; *cf. Burch v. Louisiana*, 441 U.S. 130, 137 (1979) (acknowledging that *Williams* and its progeny "departed from the strictly historical requirements of jury trial").

Williams's ruling that the Sixth Amendment (as incorporated to the States by the Fourteenth) permits a six-person jury cannot stand in light of *Ramos*. There, the Supreme Court held that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious offense. In reaching that conclusion, the Ramos Court overturned *Apodaca v. Oregon*, 406 U.S. 404 (1972), a decision that it faulted for "subject[ing] the ancient guarantee of a unanimous jury verdict to its own functionalist assessment." *Ramos*, 140 S. Ct. at 1401-02.

That reasoning undermines *Williams* as well. *Ramos* rejected the same kind of "cost-benefit analysis" the Court undertook in *Williams*, observing that it is not the Court's role to "distinguish between the historic features of common law jury trials that (we think) serve 'important enough functions to migrate silently into the Sixth Amendment and those that don't.'" *Ramos*, 140 S. Ct. at 1400-01. Ultimately, the *Ramos* Court explained, the question is whether "at the time of the Sixth Amendment's adoption, the right to trial by jury included" the particular feature at issue. *Id.* at 1402. As the history summarized above establishes, there can be no serious doubt that the common understanding of the jury trial during the Revolutionary War era was that twelve jurors were required—"a verdict, taken from eleven, was no verdict at all." *See id.* at 1395 (quotation marks omitted).

Even setting aside *Williams's* now-disfavored functionalist logic, its ruling suffered from another significant flaw: it was based on research that was out of date shortly after the opinion issued.

Specifically, the *Williams* Court "f[ou]nd little reason to think" that the goals of the jury guarantee—including, among others, "to provide a fair possibility for obtaining a representative[] cross-section

of the community"—"are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12." *Williams*, 399 U.S. at 100. The Court theorized that "in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible." *Id.* at 102.

In the time since *Williams*, that determination has proven incorrect. Indeed, the Court acknowledged as much just eight years later in *Ballew v. Georgia*, 435 U.S. 223 (1978), when it concluded that the Sixth Amendment barred the use of a five-person jury. Although *Ballew* did not overturn *Williams*, the *Ballew* Court observed that empirical studies conducted in the handful of intervening years highlighted several problems with *Williams'* assumptions. For example, *Ballew* noted that more recent research showed that (1) "smaller juries are less likely to foster effective group deliberation," *id.* at 232, (2) smaller juries may be less accurate and cause "increasing inconsistency" in verdict results, *id.* at 234, (3) the chance for hung juries decreases with smaller juries, disproportionally harming the defendant, *id.* at 236; and (4) decreasing jury sizes "foretell[] problems … for the representation of

minority groups in the community," undermining a jury's likelihood of being "truly representative of the community," *id.* at 236-37.

Moreover, the *Ballew* Court "admit[ted]" that it "d[id] not pretend to discern a clear line between six members and five," effectively acknowledging that the studies it relied on also cast doubt on the effectiveness of the six-member jury. *Id.* at 239; *see also id.* at 245-46 (Powell, J., concurring) (agreeing that five-member juries are unconstitutional, while acknowledging that "the line between five- and six-member juries is difficult to justify").

Post-*Ballew* research has further undermined *Williams*. Current empirical evidence indicates that "reducing jury size inevitably has a drastic effect on the representation of minority group members on the jury." Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. OF EMPIRICAL LEGAL STUD. 425, 427 (Sept. 2009); *see also* Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (Summer 2020) ("Larger juries are also more inclusive and more representative of the community. … In reality, cutting the size of the jury dramatically increases the chance of excluding minorities."). Because "the 12-member jury produces

significantly greater heterogeneity than does the six-member jury," Diamond et al., at 449, it increases "the opportunity for meaningful and appropriate representation" and helps ensure that juries "represent adequately a cross-section of the community." *Ballew*, 435 U.S. at 237.

Other important considerations also weigh in favor of the twelve-member jury. For instance, studies indicate that twelve-member juries deliberate longer, recall evidence better, and rely less on irrelevant factors during deliberation. *See* Smith & Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury*, 60 FLA. L. REV. 441, 465 (2008). Minority views are also more likely to be thoroughly expressed in a larger jury, as "having a large minority helps make the minority subgroup more influential," and, unsurprisingly, "the chance of minority members having allies is greater on a twelve-person jury." *Id.* at 466. Finally, larger juries deliver more predictable results. In the civil context, for example, "[s]ix-person juries are four times more likely to return extremely high or low damage awards compared to the average." Higginbotham et al., at 52.

Dominguez Zenon recognizes that the state constitution provides:

> SECTION 22. Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Art. I, § 22, Fla. Const. And he recognizes that section 913.10, Florida Statutes, provides for six jurors except in capital cases. *See also* Fla. R. Crim. P. 3.270.

But Florida's provision for a jury of six stems from the dawn of the Jim Crow era, one month after federal troops were withdrawn from the state. The historical background is as follows:

In 1875, the Jury Clause of the 1868 constitution was amended to provide that the number of jurors "for the trial of causes in any court may be fixed by law." *See Florida Fertilizer & Mfg. Co. v. Boswell*, 34 So. 241, 241 (Fla. 1903).

The common law rule of a jury of twelve was still kept in Florida while federal troops remained in the state. There was no provision for a jury of less than twelve until the Legislature enacted a provision specifying a jury of six in Chapter 3010, section 6. *See Gibson v. State*, 16 Fla. 291, 297–98 (1877) (quoting and discussing Chapter

3010, section 6, Laws of Florida (1877)); *Florida Fertilizer*, 34 So. at 241 (noting that previously all juries had twelve members).

The Legislature enacted chapter 3010 with the jury-of-six provision on February 17, 1877. *Gibson*, 16 Fla. at 294. This was less than a month after the last federal troops were withdrawn from Florida in January 1877. *See* JERRELL H. SHOFNER, *Reconstruction and Renewal, 1865-1877*, in THE HISTORY OF FLORIDA 273 (Michael Gannon, ed., first paperback edition 2018) ("there were [no] federal troops" in Florida after 23 January 1877").

The jury-of-six thus first saw light at the birth of the Jim Crow era as former Confederates regained power in southern states and state prosecutors made a concerted effort to prevent Blacks from serving on jurors.

On its face the 1868 constitution extended the franchise to Black men. But the historical context shows that that it was part of the overall resistance to Reconstruction efforts to protect the rights of Black citizens. The constitution was the product of a remarkable series of events including a coup in which leaders of the white southern (or native) faction took possession of the assembly hall in the middle of the night, excluding Radical Republican delegates from

the proceedings. *See* Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South*, 51 Fla. Hist. Q. 1, 5-6 (1972); SHOFNER, at 266. A reconciliation was effected as the "outside" whites "united with the majority of the body's native whites to frame a constitution designed to continue white dominance." Hume at 15.

The racist purpose of the resulting constitution was spelled out by Harrison Reed, a leader of the prevailing faction and the first governor elected under the 1868 constitution, who wrote to Senator Yulee that the new constitution was constructed to bar Blacks from legislative office:

> Under our Constitution the Judiciary & State officers will be appointed & the apportionment will prevent a negro legislature.

Hume, at 15-16. *See also* SHOFNER, at 266.

In *Ramos*, Justice Gorsuch noted that the Louisiana non-unanimity rule arose from Jim Crow era efforts to enforce white supremacy. *Ramos*, 140 So. Ct. at 1394; *see also id.* at 1417 (Kavanaugh, J., concurring) (non-unanimity was enacted "as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury

service."). The history of Florida's jury of six arises from the same historical context.

In view of the foregoing, a jury of six at a criminal trial is unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution. *See* U.S. Const. amend. VI, U.S. Const. amend. XIV.

Finally, Dominguez Zenon did not waive his Sixth Amendment right to a twelve-person jury. A defendant may waive his right to a constitutional jury, but the "express and intelligent consent of the defendant" is required. *Patton*, 281 U.S. at 312. Dominguez Zenon raises claim is of "constitutional dimension" not statutory right, which is fundamental error and can be raised for the first time on appeal. *See e.g., Johnson v. State*, 994 So. 2d 960, 964 (Fla. 2008) (holding Johnson's general silence "did not constitute a valid waiver" of "his right to a jury trial"); *Smith v. State*, 857 So. 2d 268, 270 (Fla. 5th DCA 2003) (reasoning the constitutional right to a jury trial is fundamental in nature).

This Court should reverse the judgment and sentence and remand for a new trial with a twelve-person jury, as required by the

Sixth and Fourteenth Amendments to the United States Constitution.

II. Based on the death-is-difference jurisprudence, a mandatory life without parole for a non-homicide offense violates the Eighth Amendment of the United States Constitution.

The trial court imposed a mandatory sentence of life without the possibility of parole or death-by-incarceration. In this appeal, Dominguez Zenon argues that mandatory life sentences for a child sex offense violates the Cruel and Unusual Punishment Clauses of the United States and Florida Constitutions. U.S. Const. amend. VIII; Art. I § 17, Fla. Const.

A. Standard of review

A pure question of law is reviewed de novo. *State v. Phillips*, 119 So. 3d 1233, 1236 (Fla. 2013). This claim was presented and deemed denied by the lower court because no ruling was issued within its sixty day jurisdiction after Dominguez Zenon filed his second Rule 3.800(b)(2) motion. SR2.247; Fla. R. Crim. P. 3.800(b)(2)(B).

B. Analysis

At the outset, Dominguez Zenon acknowledges that he has a steep precedential hill to climb. In *Harmelin v. Michigan*, 501 U.S. 957, 994-96 (1991), a split Supreme Court declined to extend the individualized-sentencing requirement of capital cases to mandatory life sentences. The plurality relied on its death-is-different doctrine,

limiting the application of its individualized-sentencing cases to capital offenses. *Id.* at 994-96, 1006-07 (Kennedy, J., concurring). But *Harmelin* was decided 27 years ago by a split court five to four on the issue of individualized sentences, and we now have a much better understanding of why the death-is-different doctrine should be applied to mandatory LWOP sentences.

Even though *Harmelin* did not address the question of whether death-is-different doctrine should be applied to a mandatory LWOP sentence for non-homicide offenses, it reasoned that LWOP may not be irrevocable because there is the potential of retroactive legislation and clemency relief. However, the reality in Florida such relief is rare if ever an option.

The Death Penalty Information Center lists only six clemencies since 1979 for individuals serving a death sentence in Florida.[4] *List of Clemencies Since 1979*, DEATH PENALTY INFO. CENT., https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976, (last visited December 19, 2022). All six of those clemency orders occurred approximately forty or more years

[4] Undersigned counsel could not find any document regarding the number of non-capital clemencies.

ago, with the most recent occurring in 1983. *Id.*

More recently in March 2021, Governor DeSantis issued a press release that he was "unilaterally exercis[ing] his clemency powers to deny the pending clemency applications of all murderers and felony sex offenders." *Press Release*, FLORIDA COMMISSION ON OFFENDER REVIEW,

(https://www.fcor.state.fl.us/docs/media/PressReleases/2021/2021%20Clemency%20Rule%20Change%20Press%20Release.pdf (last visited April 6, 2023) [hereinafter *DeSantis Press Release*]; *accord Bryan v. DeSantis*, 343 So. 3d 127 (Fla. 1st DCA 2022) (rejecting argument that blanket denial violated the clemency applicant's due process rights). The press release did not indicate when or if this blanket denial would expire. It indicated that approximately 1,000 pending petitions would be denied under that declaration. [*DeSantis Press Release*]. That exercise of power excluded all people, including Dominguez Zenon, who were convicted of capital sexual battery any opportunity for relief from their sentence that can only end with their death.

Without any avenues for release, the 10,438 Floridians, 11% of Florida's total prison population, sentenced to LWOP will serve

"decades of especially severe, dehumanizing conditions of confinement." *See Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (discussing the impact of being on death row for decades); *Detailed Data Tool (selecting Florida)*, THE SENTENCING PROJECT, https://www.sentencingproject.org/research/detailed-state-data-tool/ (last visited April 6, 2023).[5] Such is a sentence does not constitute a dignified life. *See Glossip*, 135 S. Ct. at 2765.

The Florida Supreme Court concurred that a life sentence equates to death in its analysis that a life sentence is sufficiently definite because it is "abundantly clear" "that the defendant [will] remain in prison for the rest of his life." *Ratliff v. State*, 914 So. 2d 938, 940 (Fla. 2005) (rejecting the argument that a life sentence is unconstitutional because it is an "indefinite imprisonment"). The Canadian Supreme Court also found a sentence that does not give a reasonable possibility of being released before the individual dies is "degrading in nature and thus incompatible with human dignity"

[5] It is unclear how many of the 10,438 individuals received a mandatory sentence. Florida Department of Corrections does not provide statistics on number LWOP or other life sentences. See generally *Annual Report Statistics*, FLORIDA DEPARTMENT OF CORRECTIONS ANNUAL REPORT FY 20-21, http://www.dc.state.fl.us/pub/annual/2021/FDC_AR2020-21.pdf.

because such sentences deny the individual "any possibility of reintegration into society, which presupposes, *definitely and irreversibly*, that [the individual] lacks the capacity to reform and re-enter society." *R. vs. Bissonnette*, 2022 SCC 23 (S.C.C. 2022), https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19405/index.do (emphasis added). In other words, the person has been sentenced to death and that makes the punishment different.

Incarcerating an individual "until he dies alters the remainder of his life by a forfeiture that is irrevocable" and reflects "an irrevocable judgment about" the individuals' "value and place in society." *Miller v. Alabama*, 567 U.S. 460, 473-475 (2012) (internal quotations omitted). A life without parole sentence is a "denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham v. Florida*, 560 U.S. 48, 70 (2010). (internal quotations and modifications omitted).

As one commentator said, death-by-incarceration:

> communicate[s] to offenders that they have forfeited their right to ever walk again among society. They have been forever banished. No act by the incarcerated individual can change that assessment—neither the number of degrees attained, books written, or prison programs developed nor the model behavior demonstrated can impact the inevitable outcome of death in prison. Even in the face of great internal and genuine transformation, these offenders will be left to literally molder in prison until death.

Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 76 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); *see also id.* at 73 ("John Stuart Mill perceived life imprisonment as 'living in a tomb, there to linger out what may be a long life . . . without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from earthly hope.'").

Death is different because of its finality. "Death is truly an awesome punishment" and "involves, by its very nature, a denial of the executed person's humanity." *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). A mandatory LWOP sentence rejects the potential for rehabilitation and is an "absolute renunciation of all that is embodied in our concept of humanity." *Id.* at 306 (Brennan, J., concurring). There is no viable path to resurrect the individual's life, liberty, or basic rights after that sentence has

been imposed. See *Miller*, 567 U.S. at 473-75.

Because a LWOP sentence is the equivalent of death, the death-is-different jurisprudence should be extended when LWOP is mandated for a non-homicide offense. Specifically, mandatory LWOP is similarly unconstitutional for the rape of a child where the rape did not result in death. See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding the death penalty is unconstitutional for rape of a child).

The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 419 (citing *Trop v. Dulles*, 356 U.S. 86 (1958)). "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Id.* at 420.

"A statute that shields from judicial scrutiny sentences of life without the possibility of parole raises serious constitutional concerns." *Campbell v. Ohio*, 138 S. Ct. 1059 (2018) (Sotomayor, J., concurring). "Because of the parallels between a sentence of death and a sentence of life imprisonment without parole, the Court has drawn on certain Eighth Amendment requirements developed in the

capital sentencing context to inform the life-without-parole sentencing context." *Id.*

Dominguez Zenon's mandatory death-by-incarceration sentence is unconstitutional. "The history of mandatory death penalty statutes in the United States . . . reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid." *Woodson v. North Carolina*, 428 U.S. 280, 292-93 (1976). "[I]ndividual culpability is not always measured by the category of the crime committed." *Woodson*, 428 U.S. at 298. "[J]ustice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities" of the individual convicted. *Id.* at 304.

The argument is no different here. Dominguez Zenon is serving a disproportionately cruel sentence because he has no opportunity for release and because the trial court had no discretion in sentencing him to die in prison for a crime that no longer allows a death sentence. *See Kennedy*, 554 U.S. at 413. Importantly

Dominguez Zenon had no prior criminal history.[6] If the trial court had discretion it may have considered that and the fact that he was found not guilty of one sexual battery charges.

Finally, a mandatory LWOP sentence for a child sex crime is not an "usual" punishment. Section § 794.011(2), Florida Statutes defines sexual battery as a capital felony when a person over eighteen commits sexual battery on a person less than twelve years of age. Sexual battery is defined as "oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object." § 794.011(1)(j), Fla. Stat. (2022). The State does not have to prove any force or serious bodily injury to obtain a conviction of capital sexual battery in Florida or the corresponding mandatory LWOP sentence. *See* § 775.082(1)(a), Fla. Stat. (2019).

Outside of Florida, there is only one state that mandates LWOP in similar circumstances—Louisiana. *See* La. Stat. § 42 D.(1) (LWOP when first degree rape and victim is under thirteen). That makes

---

[6] Dominguez Zenon asks this Court to take judicial notice of his criminal history since capital crimes do not require a CPC scoresheet to be created, one is not on the record. His criminal history reveals only the underlying case to this appeal.

Florida one of two states that mandate LWOP for a child sexual offense. Five additional states require LWOP when additional facts are present. Ark. Stat. §§ 5-14-103(a)(1) (child rape involving "forcible compulsion"), 5-4-104(c)(2)(A) (mandatory LWOP); Iowa Stat. §§ 709.2 (Class A felony when sexual abuse of child causes "serious injury"), 902.1 1. (mandatory LWOP for Class A felonies); Utah Stat. § 76-5-402.1(3)(b) (mandatory LWOP for rape of a child if defendant caused serious bodily injury to victim); Nev. Stat. § 200.336(3)(a) (mandatory LWOP for child sexual assault causing "substantial bodily harm"); Minn. Stat. § 609.3455 Sub. 2. (mandatory LWOP if "egregious" first-time offense).

Forty-four states do not mandate an individual die in prison after being convicted of a child sex crime. The United States Supreme Court did a similar review in *Graham* and *Miller*, looking at all the other jurisdictions to determine that Florida was an extreme outlier. Specifically, *Graham*, 560 U.S. at 62-63 (2010), the United States Supreme Court relied upon a study to recognize that "nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses." *See also Miller*, 567 U.S. at 486-87 (finding twenty-nine jurisdictions mandated LWOP for

children). Taking the Supreme Court's lead, the lack of jurisdictions mandating LWOP for child sexual crime makes Florida an outlier and its sentencing policy "unusual."

Therefore, Dominguez Zenon's mandatory life without parole sentence violates the Cruel and Unusual Punishment Clauses of the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution. U.S. Const. amend. VIII; Art. I § 17, Fla. Const. He respectfully request this Court grant a resentencing hearing for Count I so that his constitutional rights can be protected.

IN THE CIRCUIT COURT, FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2020CF004944AMB
DIV: W
OBTS NUMBER:

STATE OF FLORIDA

v.

NEFTALI DOMINGUEZZENON,
W/M,
10/18/1988,
_____/

[ ] PROBATION VIOLATOR
[ ] COMMUNITY CONTROL VIOLATOR
[ ] RETRIAL
[ ] RESENTENCE

JUDGMENT

The above defendant, being personally before this Court represented by PUBLIC DEFENDER - DIVISION W (attorney)

[X]	Having been tried and found guilty of the following crime(s):	[ ]	Having entered a plea of guilty to the following crime(s):	[ ]	Having entered a plea of nolo contendere to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE
1	Sexual Battery on	Person less than 12 years of age 794.011(2)(a)	Capital
2	Battery	784.03(1)	M1

[X] and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

[X] and being a qualified offender pursuant to s. 943.325, the Defendant shall be required to submit DNA samples as required by law.

[ ] and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

SENTENCE STAYED [ ] The Court hereby stays and withholds imposition of sentence as to count(s) and places the Defendant on [ ] probation and/or [ ] Community Control under the supervision of the Dept. Of Corrections (conditions of probation set forth in separate order).

SENTENCE DEFERRED [ ] The Court hereby defers imposition of sentence until

The Defendant in Open Court was advised of his right to appeal from the Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at Palm Beach County, Florida, this 17th day of FEBRUARY, ~~2020.~~ 2022

Jeffrey Dana Gillen
CIRCUIT COURT JUDGE

FILED
Circuit Criminal Department
FEB 17 2022
JOSEPH ABRUZZO
Clerk of the Circuit Court & Comptroller
Palm Beach County

IN THE CRIMINAL DIVISION OF THE CIRCUIT/COUNTY COURT OF THE FIFTEENTH JUDICAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. **50-2020-CF-004944-AXXX-MB** DIV. **W: Felony - W (Circuit)**

OBTS NUMBER: **5002352232**

STATE OF FLORIDA

V

NEFTALI DOMINGUEZZENON
DEFENDANT

[ ] COMMUNITY CONTROL VIOLATOR

[ ] PROBATION VIOLATION

October 18, 1988	White	Male
DATE OF BIRTH	RACE	GENDER

The fingerprints below are those of said Defendant taken by Deputy Sheriff Inyan

1. R. THUMB	2. R. INDEX	3. R. MIDDLE	4. R. RING	5. R. LITTLE
				
6. L. THUMB	**7. L. INDEX**	**8. L. MIDDLE**	**9. L. RING**	**10. L. LITTLE**
				

I hereby certify that the above and foregoing fingerprints are the fingerprints of the defendant, NEFTALI DOMINGUEZZENON, and that they were placed thereon by said defendant in my presence this 11 day of February, 20 21.

DS 9781

Circuit/County Court Judge - Clerk - ~~Deputy Sheriff~~
(Please Circle Title)

pg 2 of 2

CRIMINAL-FINGERPRINT CARD PB

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SENTENCE
(As to Count(s) 1)

Defendant: Neftali Dominguezzenon

Case Number: 20CF 4944AXXX

OBTS Number: _____

The Defendant, being personally before this Court, accompanied by the defendant's attorney of record, J. Ziehler, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $_____ pursuant to § 755.083, Florida Statutes, plus $_____ as the 5% surcharge required by section 938.04, Florida Statutes.

The Defendant is hereby committed to the custody of the
[X] Department of Corrections
[ ] Sheriff of Palm Beach County, Florida

[ ] Department of Corrections as a youthful offender
For a term of Life. It is further ordered that the Defendant shall be allowed a total of 667 days as credit for time incarcerated prior to imposition of this sentence. It is further ordered that the composite term of all sentences imposed for the counts specified in the order shall run
[ ] consecutive to [X] concurrent with (check one) the following:
[ ] Any active sentence being served.
[X] Specific sentences: Counts 1 and 2
[ ] The instant sentence is based upon the Court having previously placed the Defendant on probation and having subsequently revoked the Defendant's probation for violation(s) of condition(s)_____.

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

[ ] The Sentencing Court objects to the Defendant being placed into the Youthful Offender Basic Training Program pursuant to Florida Statute §958.045.

[ ] Pursuant to §322.055, 322.056, 322.26, 322.274, Florida Statutes, The Department of Highway Safety and Motor Vehicles is directed to revoke the Defendant's privilege to drive. The Clerk of the Court is Ordered to report the conviction and revocation to the Department of Highway Safety and Motor Vehicles.

DONE AND ORDERED in Open Court at West Palm Beach, Palm Beach County, Florida this 22nd day of April, 2022.

nunc pro tunc
4/12/22

Jeffrey Dana Gillen
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

Corrected

SENTENCE

(As to Count(s) 2)

Defendant: Dominguezzenon, Naftali

Case Number: 2020CF004944AMB

OBTS Number: _____

The Defendant, being personally before this Court, accompanied by the defendant's attorney of record, _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $_____ pursuant to § 755.083, Florida Statutes, plus $_____ as the 5% surcharge required by section 938.04, Florida Statutes.

The Defendant is hereby committed to the custody of the
[ ] Department of Corrections
[✓] Sheriff of Palm Beach County, Florida

[ ] Department of Corrections as a youthful offender

For a term of 364 days. It is further ordered that the Defendant shall be allowed a total of 364 days as credit for time incarcerated prior to imposition of this sentence. It is further ordered that the composite term of all sentences imposed for the counts specified in the order shall run

[ ] consecutive to [✓] concurrent with (check one) the following:
[ ] Any active sentence being served.
[✓] Specific sentences: Count 1

[ ] The instant sentence is based upon the Court having previously placed the Defendant on probation and having subsequently revoked the Defendant's probation for violation(s) of condition(s)_____.

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

[ ] The Sentencing Court objects to the Defendant being placed into the Youthful Offender Basic Training Program pursuant to Florida Statute §958.045.

[ ] Pursuant to §322.055, 322.056, 322.26, 322.274, Florida Statutes, The Department of Highway Safety and Motor Vehicles is directed to revoke the Defendant's privilege to drive. The Clerk of the Court is Ordered to report the conviction and revocation to the Department of Highway Safety and Motor Vehicles.

DONE AND ORDERED in Open Court at West Palm Beach, Palm Beach County, Florida this 12 day of March, 2024
Nunc pro tunc April 12, 2022

Jeffrey Dana Gillen

CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SENTENCE WITH SPECIAL PROVISIONS

(As to Count(s) 1)

Defendant: Neftali Dominguezzenon

Case Number: 2020 CF 4944 AXXX

OBTS Number: _____

The Defendant, being personally before this Court, accompanied by the defendant's attorney of record, J. Ziehler, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

By reference to count, the following additional provisions apply to the sentence imposed:

Count

FIREARM
It is further ordered that the _____ (___) year minimum imprisonment provision of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

PRISON RELEASEE RE-OFFENDER
The Defendant is adjudicated a prison release re-offender and has been sentenced in accordance with the provisions of Florida Statute 775.082(9). The Defendant shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Additionally, the Defendant must serve 100 percent of the statutory maximum. The requisite findings by the Court are set forth in a separate order or stated in the record in Open Court.

DRUG TRAFFICKING
It is further ordered that the _____ mandatory minimum imprisonment provision of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

CONTROLLED SUBSTANCE WITHIN 1,000 FEET OF SCHOOL
It is further ordered that the 3-year minimum imprisonment provision of section 893.13(1)(c)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

HABITUAL FELONY OFFENDER
The Defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the Court are set forth in a separate order or stated on the record in Open Court.

HABITUAL VIOLENT FELONY OFFENDER
The Defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings by the Court are set forth in a separate order or stated on the record in Open Court.

Case No 20cf4944Axx
Defendant: N. Dominique Zzenan

THREE TIME VIOLENT FELONY OFFENDER
The Defendant is adjudicated a three-time violent felony offender and has been sentenced in accordance with the provisions of Florida Statute 775.084(4)(c). The requisite findings by the Court are set forth in a separate order or stated in the record in Open Court.

VIOLENT CAREER CRIMINAL
The Defendant is adjudicated a habitual violent offender and has been sentenced to an extended term in accordance with the provisions of Florida Statute 775.084(4)(d). A minimum term of _____ years must be served prior to release. The requisite findings by the Court are set forth in a separate order or stated in the record in Open Court.

DUI MANSLAUGHTER
It is further ordered that the Defendant shall serve a mandatory minimum of four (4) years before release in accordance with Florida Statute 316.193.

LAW ENFORCEMENT PROTECTION ACT
It is further ordered that the Defendant shall serve a minimum of _____ years before release in accordance with section 775.0823, Florida Statutes. (Offenses committed before January 1, 1994)

CRIMES AGAINST LAW ENFORCEMENT OFFICERS (check one)
[____] The Defendant having been convicted of Aggravated Assault on a Law Enforcement Officer, it is further ordered that the Defendant shall serve a minimum of 3 years before release in accordance with Florida Statute 784.07(2)(c).
[____] The Defendant having been convicted of Aggravated Battery on a Law Enforcement Officer, it is further ordered that the Defendant shall serve a minimum of 5 years before release in accordance with Florida Statute 784.07(2)(d).
[____] The Defendant having been convicted of Battery on a Law Enforcement Officer and having possessed a firearm or destructive device during the commission of said offense, it is further ordered that the Defendant shall serve a minimum of 3 years before release in accordance with Florida Statute 784.07(3)(a).

CAPITAL OFFENSE
It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes. (Offenses committed before October 1, 1995)

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN
It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count. (Offenses committed before January 1, 1994)

TAKING A LAW ENFORCEMENT OFFICER'S FIREARM
It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count. (Offenses committed before January 1, 1994)

SEXUAL OFFENDER/SEXUAL PREDATOR DETERMINATIONS:

Ct. 1

SEXUAL PREDATOR
The Defendant is adjudicated a sexual predator as set forth in section 775.21, Florida Statutes.

SEXUAL OFFENDER
The Defendant meets the criteria for a sexual offender as set forth in section 943.0435(1)(a)1a., b., c., or d.

AGE OF VICTIM
The victim was _____ years of age at the time of the offense.

AGE OF DEFENDANT
The Defendant was _____ years of age at the time of the offense.

Case No 20CF4944AXX
Defendant: J. Dominguezzehon

RELATIONSHIP TO VICTIM
The Defendant is not the victim's parent or guardian.

SEXUAL ACTIVITY [F.S. 800.04(4)]
The offense _____ did _____ did not involve sexual activity.

USE OF FORCE OR COERCION [F.S. 800.04(4)]
The sexual activity described herein _____ did _____ did not involve the use of force or coercion.

USE OF FORCE OR COERCION/UNCLOTHED GENITALS [F.S. 800.04(5)]
The molestation _____ did _____ did not involve unclothed genitals or genital area.
The molestation _____ did _____ did not involve the use of force or coercion.

OTHER PROVISIONS:

CRIMINAL GANG ACTIVITY
The felony conviction is for an offense that was found, pursuant to section 874.04, Florida Statutes, to have been committed for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.

RETENTION OF JURISDICTION
The Court retains jurisdiction over the Defendant pursuant to section 947.16(4), Florida Statutes.

SUSPENDED AND/OR SPLIT SENTENCES:

Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in a separate order entered herein.

However, after serving a period of _____ imprisonment the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections, according to the terms and conditions of probation as set forth in a separate order entered herein.

Followed by a period of _____ on probation under the supervision of the Department of Corrections, according to the terms and conditions of probation as set forth in a separate order entered herein.

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

DONE AND ORDERED in Open Court at Palm Beach County, Florida on this 22nd day of April, 20 22.

Jeffrey Dana Gillen
Circuit Judge

nunc Pro Tunc
4/12/22